No. 15-1500

Title:	Brian Lewis, et al., Petitioners v. William Clarke
Docketed:	June 13, 2016
Lower Ct:	Supreme Court of Connecticut
Case Nos.:	(19464)
Decision Date:	March 15, 2016

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jun 13 2016	Petition for a writ of certiorari filed. (Response due July 13, 2016)
Jul 13 2016	Brief of respondent William Clarke in opposition filed.
Jul 26 2016	Reply of petitioners Brian Lewis, et al. filed.
Jul 27 2016	DISTRIBUTED for Conference of September 26, 2016.
Sep 29 2016	Petition GRANTED.
Oct 7 2016	Motion to dispense with printing the joint appendix filed by petitioners Brian Lewis, et al.
Oct 31 2016	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Nov 14 2016	Brief of petitioners Brian Lewis, et al. filed.
Nov 18 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent.
Nov 21 2016	Brief amicus curiae of United States, supporting reversal filed.
Nov 21 2016	Brief amici curiae of Connecticut Trial Lawyers Association, et al. filed.
Dec 5 2016	SET FOR ARGUMENT on Monday, January 9, 2017.
Dec 7 2016	Record requested from the Supreme Court of Connecticut.
Dec 12 2016	CIRCULATED.
Dec 14 2016	Brief of respondent William Clarke filed. (Distributed)
Dec 21 2016	Record received from the Supreme Court of Connecticut. (1 Envelope)
Dec 21 2016	Brief amici curiae of Seminole Tribe of Florida, et al. filed. (Distributed)
Dec 21 2016	Brief amici curiae of The National Congress of American Indians, et al. filed. (Distributed)
Dec 21 2016	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Dec 21 2016	Brief amici curiae of The State of Arizona and the State of Oregon filed. (Distributed)
Dec 21 2016	Brief amici curiae of Ninth and Tenth Circuit Tribes filed. (Distributed)
Dec 21 2016	Brief amici curiae of The Otoe-Missouria Tribe of Indians, et al. filed. (Distributed)
Dec 28 2016	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Dec 30 2016	Reply of petitioners Brian Lewis, et al. filed. (Distributed)

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RECORD AND BRIEFS

No. 15-1500

Supreme Court, U.S.
FILED
JUN 13 2016
OFFICE OF THE CLERK

In the Supreme Court of the United States

BRIAN LEWIS AND MICHELLE LEWIS, PETITIONERS

v.

WILLIAM CLARKE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the sovereign immunity of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment.

PARTIES TO THE PROCEEDING

Petitioners are Brian Lewis and Michelle Lewis, plaintiffs and appellees below.

Respondent is William Clarke, defendant and appellant below.

The Mohegan Tribal Gaming Authority was initially named as a defendant but was subsequently dismissed from the case and was not a party in the Supreme Court of Connecticut.

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In the Supreme Court of the United States

No.

BRIAN LEWIS AND MICHELLE LEWIS, PETITIONERS

v.

WILLIAM CLARKE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

PETITION FOR A WRIT OF CERTIORARI

Brian Lewis and Michelle Lewis respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Connecticut in this case.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court (App., *infra*, 1a-17a) is reported at 320 Conn. 706. The opinion of the Connecticut Superior Court (App., *infra*, 18a-36a) is unreported but is available at 2014 WL 5354956.

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on March 15, 2016. The jurisdiction of this court is invoked under 28 U.S.C. 1257(a).

INTRODUCTION

As "domestic dependent nations," Indian tribes enjoy some of the attributes of sovereignty, including sovereign immunity—the right not to be subject to suit without their consent. *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2039 (2014) (quoting *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)). In cases involving States and the federal government, this Court has held that sovereign immunity bars official-capacity actions against government officials. In an official-capacity action, although the official is the nominal defendant, the plaintiff seeks relief that runs against the government. Official-capacity suits thus "represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985) (quoting *Monell* v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)).

Individual-capacity actions are different. In an individual-capacity action, the plaintiff seeks to impose personal liability on the official, and any award of damages "can be executed only against the official's personal assets." *Graham*, 473 U.S. at 166. For that reason, sovereign immunity does *not* bar an individual-capacity damages action against a state or federal official, even if the action arises out of conduct the official undertook while carrying out official duties.

This case presents the question whether the sovereign immunity of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment. Applying this Court's cases explaining the distinction between official-capacity and individual-capacity actions, the Ninth and Tenth Circuits have correctly held that the answer is no. But in the decision below, the Connecticut Supreme Court has joined the Second Circuit and the Montana Supreme Court in reaching the opposite conclusion.

The court below did not attempt to justify its holding on the basis of considerations of tribal sovereignty or self-government, nor could it have done so. Respondent was employed by an Indian tribe to drive a limousine to transport patrons to and from a casino. While driving on an interstate highway 70 miles from the casino, he ran into petitioners' car. Petitioners have asserted garden-variety state-law negligence claims based on respondent's off-reservation conduct, and there is no reason why tribal employees should enjoy immunity in that context. In dismissing petitioners' claims, the Connecticut Supreme Court applied a form of tribal sovereign immunity that is broader than the immunity enjoyed by States and the federal government, and it disregarded this Court's admonition that a State must retain the ability "to enforce its law on its own lands." *Bay Mills*, 134 S. Ct. at 2035. The decision below will leave many persons who have been injured by tribal employees without any remedy at all.

The Connecticut Supreme Court attempted to distinguish some of the cases on the other side of the con-

flict, but there is little question that, on these facts, the Ninth and Tenth Circuits would have reached a different result. Given the number of courts on each side, the conflict will not be resolved without this Court's intervention. As long as it persists, there will be uncertainty about the standards governing tort claims against the hundreds of thousands of tribal employees in the nation.

Less than four years ago, this Court called for the views of the Solicitor General in *Young* v. *Fitzpatrick*, 133 S. Ct. 2848 (2013), a case raising a similar question, but it ultimately denied certiorari after the Solicitor General explained that the issue had not been adequately preserved. This case, by contrast, is an ideal vehicle for resolving this important legal question. This Court's review is needed now.

STATEMENT

1. On October 22, 2011, petitioners were driving on Interstate 95 in Norwalk, Connecticut, when their car was struck from behind by a limousine driven by respondent. Petitioners' car was pushed into a concrete barrier, and petitioners were injured. At the time of the accident, respondent was employed by the Mohegan Tribal Gaming Authority (MTGA), an arm of the Mohegan Tribe of Indians of Connecticut, and he was driving patrons of the Mohegan Sun Casino, which is approximately 70 miles from Norwalk. App., *infra*, 2a.

2. Petitioners brought a negligence action against respondent in the Connecticut Superior Court. Petitioners initially named both respondent and the MTGA as defendants, but they voluntarily dismissed the MTGA and filed an amended complaint against only respondent. App., *infra*, 3a, 18a-19a.

Respondent moved to dismiss. He argued that the MTGA was entitled to sovereign immunity because it is an arm of the Mohegan Tribe and that he, in turn, was entitled to sovereign immunity because he was an employee of the MTGA acting within the scope of his employment at the time of the accident. App., *infra*, 22a.

The Connecticut Superior Court denied the motion to dismiss. App., *infra*, 18a-36a. The court applied the test adopted by the Ninth Circuit in *Maxwell* v. *County of San Diego*, 708 F.3d 1075 (9th Cir. 2013), under which tribal employees do not enjoy sovereign immunity when "the remedy sought by the plaintiffs would operate only against them personally." App., *infra*, 27a. Here, the court explained, respondent is "being sued solely in his individual capacity for an alleged tort occurring off the tribal reservation," and "because the remedy sought is not against the MTGA, [respondent] is not immune from suit." *Id.* at 25a.

3. The Connecticut Supreme Court reversed. App., *infra*, 1a-17a. The court stated that "[t]he doctrine of tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority." *Id.* at 10a (quoting *Romanella* v. *Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996), aff'd, 114 F.3d 15 (2d Cir. 1997)) (brackets in original). It noted that "the tribe is neither a party, nor the real party in interest because the remedy sought will be paid by the defendant himself, and not the tribe." App., *infra*, 13a. And it acknowledged that, in *Maxwell*, the Ninth Circuit had concluded that sovereign immunity is inapplicable when plaintiffs seek a remedy only from individual tribal employees,

not from the tribe itself. *Id.* at 14a. But it reasoned that *Maxwell* was inapposite because that case involved allegations of gross negligence, not ordinary negligence, and "[a]ctions involving claims of more than negligence are often deemed to be outside the scope of employment and, therefore, not subject to sovereign immunity." *Ibid.* The court concluded that "plaintiffs cannot circumvent tribal immunity by merely naming the defendant, an employee of the tribe, when the complaint concerns actions taken within the scope of his duties and the complaint does not allege, nor have the plaintiffs offered any other evidence, that he acted outside the scope of his authority." *Id.* at 16a-17a. The court therefore remanded with instructions to grant the motion to dismiss. *Id.* at 17a.

REASONS FOR GRANTING THE PETITION

A. Lower courts are divided on whether tribal sovereign immunity bars individual-capacity damages actions against tribal employees

The Connecticut Supreme Court held that "the doctrine of tribal sovereign immunity extends to [petitioners'] claims against [respondent] because the undisputed facts of this case establish that he was an employee of the tribe and was acting within the scope of his employment when the accident occurred." App., *infra*, 16a. That decision contributes to a conflict among the lower courts. All courts that have considered the question have agreed that tribal sovereign immunity applies to at least some actions against tribal officers and employees. But the courts disagree about when it applies. The Ninth and Tenth Circuits

have held that immunity applies only when the remedy sought would run against the tribe. On the other hand, the court below has joined the Second Circuit and the Montana Supreme Court in holding that immunity applies whenever the conduct giving rise to the cause of action was within the scope of the defendant's employment. As this case illustrates, those two approaches lead to inconsistent results in cases with similar facts.

1. **The Ninth and Tenth Circuits have held that tribal sovereign immunity does not apply to individual-capacity damages actions**

The court below expressly declined to follow the Ninth Circuit's decision in *Maxwell* v. *County of San Diego*, 708 F.3d 1075 (9th Cir. 2013), in which the court held that a damages action "brought against individual officers in their individual capacities * * * does not implicate sovereign immunity." *Id.* at 1088. In *Maxwell*, the Ninth Circuit explained that the application of sovereign immunity to a suit against a government or tribal official depends on the remedy that is sought. When "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting," then the action is one against the sovereign, and immunity may apply. *Ibid.* (quoting *Shermoen* v. *United States*, 982 F.2d 1312, 1320 (9th Cir. 1992), cert. denied, 509 U.S. 903 (1993)) (brackets in original). But when a "plaintiff seeks money damages 'not from the state treasury but from the officer[s] personally,'" then the action does not implicate sovereign immunity. *Ibid.*

(quoting *Alden* v. *Maine*, 527 U.S. 706, 757 (1999)) (brackets in original).

The plaintiffs in *Maxwell* had brought state-law tort claims against paramedics employed by a tribal fire department who, plaintiffs alleged, had improperly delayed the treatment of a shooting victim. *Id.* at 1079-1081. The paramedics argued that the claims were barred by tribal sovereign immunity, but the Ninth Circuit rejected that argument, explaining that the "paramedics do not enjoy tribal sovereign immunity because a remedy"—money damages—"would operate against them, not the tribe." *Id.* at 1087.

In an earlier case, *Cook* v. *Avi Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008), cert. denied, 556 U.S. 1221 (2009), the Ninth Circuit had stated that "tribal immunity protects tribal employees acting in their official capacity and within the scope of their authority." *Id.* at 727. The court in *Maxwell* acknowledged that language but explained that *Cook* concerned a suit against tribal defendants in their *official* capacity, and therefore "the tribe was the 'real, substantial party in interest.'" 708 F.3d at 1088 (quoting *Cook*, 548 F.3d at 727). The decision in *Cook*, the *Maxwell* court observed, had "conflated the 'scope of authority' and 'remedy sought' principles because they are coextensive in official capacity suits." *Ibid.* The Ninth Circuit concluded that *Cook* "does not change the rule that individual capacity suits related to an officer's official duties are generally permissible." *Ibid.*

More recently, in a damages action involving state-law claims for battery, false imprisonment, and other torts, the Ninth Circuit reaffirmed *Maxwell*'s holding, determining that tribal employees were "not entitled

to sovereign immunity because they were sued in their individual rather than their official capacities, as any recovery will run against the individual tribal defendants, rather than the tribe." *Pistor* v. *Garcia*, 791 F.3d 1104, 1108 (9th Cir. 2015). The court reasoned that "[s]o long as any remedy will operate against the officers individually, and not against the sovereign, there is 'no reason to give tribal officers broader sovereign immunity protections than state or federal officers.'" *Id.* at 1113 (quoting *Maxwell*, 708 F.3d at 1089). "Even if the Tribe agrees to pay for the tribal defendants' liability," the court added, "that does not entitle them to sovereign immunity" because "'[t]he unilateral decision to insure a government officer against liability does not make the officer immune from that liability.'" *Id.* at 1114 (quoting *Maxwell*, 708 F.3d at 1090).

Like the Ninth Circuit, the Tenth Circuit has recognized that tribal sovereign immunity may bar official-capacity actions against tribal officers but does not apply to individual-capacity damages actions. In *Native American Distributing* v. *Seneca–Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008), the court explained that sovereign immunity applies only when the remedy sought would operate against the tribe:

> The general bar against official-capacity claims * * * does not mean that tribal officials are immunized from individual-capacity suits *arising out of* actions they took in their official capacities * * * . Rather, it means that tribal officials are immunized from suits brought against them *because of* their official capacities—that is, because the powers they possess in those capacities enable

> them to grant the plaintiffs relief on behalf of the tribe.

Id. at 1296 (citation omitted); accord *Fletcher* v. *United States*, 116 F.3d 1315, 1324 (10th Cir. 1997) ("Because the relief requested * * * would run against the Tribe itself, the Tribe's sovereign immunity protects these defendants in their official capacities."). Although a subsequent decision undermined the clarity of that statement by extending sovereign immunity to bar a damages action against a tribal governor, see *Burrell* v. *Armijo*, 603 F.3d 825, 832 (10th Cir. 2010), more recently the Tenth Circuit has continued to apply the rule set out in *Native American Distributing*, see *Sanders* v. *Anoatubby*, 631 Fed. Appx. 618, 622 n.9 (10th Cir. 2015).

The Louisiana Court of Appeal has also embraced the Ninth Circuit's rule, approvingly citing *Maxwell* and *Pistor* and adopting "a remedy-focused analysis" to determine the availability of sovereign immunity. *Zaunbrecher* v. *Succession of David*, 181 So. 3d 885, 888 (La. Ct. App. 2015), cert. denied, 187 So. 3d 1002 (La. 2016).

2. The court below joined the Second Circuit and the Montana Supreme Court in holding that sovereign immunity bars actions against tribal employees based on conduct within the scope of their employment

As the court below observed, the Second Circuit has held that tribal sovereign immunity bars an individual-capacity damages action against a tribal employee when the action is based on conduct within the scope of his employment. App., *infra*, 11a-12a (cit-

ing *Chayoon* v. *Chao*, 355 F.3d 141, 143 (2d Cir.), cert. denied, 543 U.S. 966 (2004)). In *Chayoon*, for example, the Second Circuit held that tribal sovereign immunity barred a damages action against tribal officials under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.* That statute allows for the imposition of liability on individual supervisors, but the court did not consider whether the damages sought by the plaintiff would come from the officials as individuals. See 29 U.S.C. 2617(a) (providing a damages action against an "employer"); 29 U.S.C. 2611(4)(A)(ii)(I) (defining "employer" to include "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer"). Instead, it relied on the categorical proposition that a plaintiff "cannot circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority." *Chayoon*, 355 F.3d at 143; accord *Romanella* v. *Hayward*, 933 F. Supp. 163, 168 (D. Conn. 1996) (concluding that tribal sovereign immunity barred a damages action against tribal employees who were responsible for the maintenance of a parking lot in which the plaintiff slipped, and reasoning that "the negligence claims asserted against [the employees] directly relate to their performance of their official duties"), aff'd, 114 F.3d 15 (2d Cir. 1997).

The Montana Supreme Court has adopted the same position. In *Koke* v. *Little Shell Tribe of Chippewa Indians of Montana, Inc.*, 68 P.3d 814 (Mont. 2003), the plaintiffs sought tort damages against tribal offi-

cials for alleged misconduct in connection with a tribal election. *Id.* at 815. Although the plaintiffs had sued the officials as individuals, see *id.* at 814, the Montana Supreme Court held that tribal sovereign immunity barred the action because "the tribal officials acted in their official capacities" in the events giving rise to the litigation, *id.* at 817.

Intermediate appellate courts in Arizona, California, New York, and Washington have reached the same conclusion. See *Filer* v. *Tohono O'Odham Nation Gaming Enter.*, 129 P.3d 78, 85-86 (Ariz. Ct. App. 2006) (tribal sovereign immunity barred damages action against tribal employees who allegedly served alcohol to intoxicated casino patron who later caused accident); *Trudgeon* v. *Fantasy Springs Casino*, 84 Cal. Rptr. 2d 65, 72 (Cal. Ct. App. 1999) (tribal sovereign immunity barred damages action against tribal employees who allegedly failed to prevent fight in casino parking lot); *Zeth* v. *Johnson*, 765 N.Y.S.2d 403, 404 (N.Y. App. Div. 2003) (tribal sovereign immunity barred damages action against tribal employee who struck plaintiff's vehicle while operating snowplow); *Young* v. *Duenas*, 262 P.3d 527, 531 (Wash. Ct. App. 2011) (tribal sovereign immunity barred damages action against tribal police officers who allegedly used excessive force in making arrest), cert. denied, 133 S. Ct. 2848 (2013).

3. The decision below cannot be reconciled with the decisions of the Ninth and Tenth Circuits

The Connecticut Supreme Court attempted to distinguish the Ninth Circuit's decision in *Maxwell* on the theory that that case "involved claims of gross negli-

gence," and "[a]ctions involving claims of more than negligence are often deemed to be outside the scope of employment and, therefore, not subject to sovereign immunity." App., *infra*, 14a; see *id.* at 15a n.6 (offering a similar distinction of *Pistor*). That reasoning is flawed.

As an initial matter, an employee's conduct is not outside the scope of his or her employment merely because it involves "gross negligence." Under the common-law test applied in most jurisdictions, conduct is within the scope of employment if it is "of the kind [the employee] is employed to perform," if "it occurs substantially within the authorized time and space limits," if "it is actuated, at least in part, by a purpose to serve the master," and, when it involves the use of force, if the use of force is foreseeable by the master. *Restatement (Second) of Agency* § 228(1) (1958). That test applies regardless of how negligent or even willful the conduct may be: "An act may be within the scope of employment although consciously criminal or tortious." *Id.* § 231. Accordingly, courts routinely find grossly negligent conduct to be within the scope of employment. See, *e.g.*, *Scottsdale Ins. Co.* v. *Subscription Plus, Inc.*, 299 F.3d 618, 621-622 (7th Cir. 2002); *Protectus Alpha Nav. Co.* v. *North Pac. Grain Growers, Inc.*, 767 F.2d 1379, 1387 (9th Cir. 1985).

More importantly, under the rule adopted by the Ninth and Tenth Circuits, neither the scope of tribal officials' employment nor their level of carelessness has anything to do with whether sovereign immunity applies to an action against them. As those courts have explained, immunity depends on the capacity in which the defendants are sued, not on the capacity in

which they were acting at the time of the events giving rise to the litigation. "So long as any remedy will operate against the officers individually, and not against the sovereign," tribal sovereign immunity does not apply. *Pistor*, 791 F.3d at 1113; accord *Native Am. Distrib.*, 546 F.3d at 1296.

The complaint in this case seeks relief only from an individual tribal employee, not from the Tribe—the MTGA was expressly dropped as a defendant. App., *infra*, 3a n.2. For that reason, it is an individual-capacity action for damages against the tribal employee. Had this lawsuit been brought in either the Ninth or the Tenth Circuit, it would not have been dismissed on the basis of sovereign immunity.

B. The decision below is contrary to this Court's cases limiting the scope of sovereign immunity in actions against government officials

Sovereign immunity bars suits seeking relief from the sovereign, not suits seeking relief only from the sovereign's employees. In extending tribal sovereign immunity to bar a damages action against a tribal employee, the Connecticut Supreme Court misapplied this Court's precedents describing the difference between individual-capacity and official-capacity actions. It also created a form of tribal immunity that is far broader than the comparable immunities applicable to States and the federal government. That immunity will leave many plaintiffs who have been injured by tribal employees without a remedy.

1. This Court has identified an "important limit to the principle of sovereign immunity"—namely, that it does not "bar all suits against state officers." *Alden*,

527 U.S. at 756. Some suits against officers "are barred by the rule that sovereign immunity is not limited to suits which name the State as a party if the suits are, in fact, against the State." *Ibid.* But sovereign immunity "does not bar certain actions against state officers for injunctive or declaratory relief," as under *Ex parte Young*, 209 U.S. 123 (1908). *Alden*, 527 U.S. at 757. And, crucially, "[e]ven a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally." *Ibid.*

As this Court has previously explained, "damages actions against public officials require[] careful adherence to the distinction between personal- and official-capacity suits." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985). "Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law," and "an award of damages against an official in his personal capacity can be executed only against the official's personal assets." *Id.* at 165, 166. By contrast, "[o]fficial-capacity suits * * * generally represent only another way of pleading an action against an entity of which an officer is an agent." *Id.* at 165 (quoting *Monell* v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)). In other words, an official-capacity suit "is not a suit against the official but rather is a suit against the official's office. As such it is no different from a suit against the State itself." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (citation omitted).

The Connecticut Supreme Court expressly rejected what it called "the 'remedy sought' approach"—that is, an inquiry into whether the relief sought in the litigation would run against the sovereign or only against the officer personally. App., *infra*, 16a. Instead, the court focused on the capacity in which the defendant was alleged to have acted; in its view, the critical fact was respondent's status as "an employee of the tribe [who] was acting within the scope of his employment when the accident occurred." *Ibid.* But that approach is directly contrary to this Court's instruction that "the phrase 'acting in their official capacities,'" when used in describing official-capacity claims, "is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." *Hafer* v. *Melo*, 502 U.S. 21, 26 (1991). Merely acting within the scope of official authority does not immunize an officer from personal liability. *Id.* at 28. Instead, the principle of sovereign immunity simply "does not erect a barrier against suits to impose 'individual and personal liability'" on government officials, even if that liability is based on acts they took in the course of their official duties. *Id.* at 30-31 (quoting *Scheuer* v. *Rhodes*, 416 U.S. 232, 238 (1974)); accord *Alden*, 527 U.S. at 757.

2. The decision below yields the anomalous effect of extending the sovereign immunity of Indian tribes far more broadly than the sovereign immunity of States or the federal government. As to States, the "fundamental postulates implicit in the constitutional design," *Alden*, 527 U.S. at 729, include the principles that "each State is a sovereign entity in our federal system" and that immunity from suit is "inherent

in the nature of sovereignty," *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 54 (1996) (internal quotation marks omitted). Nevertheless, as already explained, those principles do not bar actions "against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself." *Alden*, 527 U.S. at 757. Such actions—most commonly brought under 42 U.S.C. 1983—are routine.

Similarly, "[s]overeign immunity shields the United States from suit" in the absence of an express statutory waiver. *United States* v. *Bormes*, 133 S. Ct. 12, 16 (2012). But the sovereign immunity of the United States does not prohibit individual-capacity damages actions against federal officers. For example, this Court has recognized a cause of action against federal officers for certain constitutional violations. *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); see *id.* at 410 (Harlan, J., concurring) (noting that, notwithstanding the availability of individual liability, "the sovereign still remains immune to suit"). And individual liability extends beyond constitutional claims: this Court has held that federal officials are not generally immune from state-law tort liability. While the Court has recognized that state-law tort suits against federal officers may be subject to an individual official immunity—not to sovereign immunity—that individual immunity is limited to situations in which "the challenged conduct is within the outer perimeter of an official's duties and is *discretionary* in nature." *Westfall* v. *Erwin*, 484 U.S. 292, 300 (1988) (emphasis added). Congress subsequently broadened the scope of immunity

for federal officials, but it has created no comparable statutory immunity for tribal officials. Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563.

As the Ninth Circuit has correctly observed, there is "no reason to give tribal officers broader sovereign immunity protections than state or federal officers given that tribal sovereign immunity is coextensive with other common law immunity principles." *Maxwell*, 708 F.3d at 1089. Indeed, this Court has held that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers," not some other, broader immunity. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978); see *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2041 (2014) (Sotomayor, J., concurring) (cautioning against "disparate treatment of these two classes of domestic sovereigns"—States and Indian tribes).

In *Kiowa Tribe of Oklahoma* v. *Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), this Court observed that tribal sovereign immunity is a common-law doctrine that "developed almost by accident." *Id.* at 756. Recognizing that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine," the Court has adhered to it only because of principles of *stare decisis*. *Id.* at 758; accord *Bay Mills*, 134 S. Ct. at 2036-2039. But while those principles may compel the doctrine's retention (at least in the absence of congressional action), they provide no basis for extending it beyond that of any other sovereign in our system of government.

3. The Connecticut Supreme Court's error was not simply a matter of attaching the wrong label to the immunity that it extended to respondent. While this Court has recognized immunity doctrines that protect some government officials from certain kinds of individual-capacity damages actions, none of those doctrines applies here. This Court's cases construing the scope of official immunities show how far the court below departed from established principles governing damages actions against government officials.

For example, this Court has held that certain government officials are entitled to qualified immunity from liability based on their official conduct. Under the doctrine of qualified immunity, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). That doctrine, however, does not apply to this case, which involves a claim of negligence arising from the nondiscretionary act of driving a limousine on a highway.

This Court has also recognized a rule of absolute immunity for certain government officials, but that rule applies even more narrowly than qualified immunity. Specifically, absolute immunity is available only to government officials performing certain narrowly defined functions, most of them associated with the judicial process. See *Rehberg* v. *Paulk*, 132 S. Ct. 1497 (2012) (witnesses); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976) (prosecutors); *Pierson* v. *Ray*, 386 U.S. 547 (1967) (judges); *Tenney* v. *Brandhove*, 341 U.S. 367

(1951) (legislators); see also *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982) (President of the United States). The functions performed by respondent—driving patrons to and from a tribal casino—do not fit within any of the traditional categories of absolute immunity.

Finally, certain activities of Indian tribes may be immune from state regulation altogether, including through the imposition of civil liability on tribal officials. Thus, when a state-law claim arises out of on-reservation activity, it may sometimes be preempted by federal law or by the interests of tribal sovereignty. See *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324 (1983); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980). But that doctrine has no application to this case, which arises out of off-reservation commercial activity. Applying state law to a motor-vehicle accident on an off-reservation highway would in no sense "infringe[] on the right of reservation Indians to make their own laws and be ruled by them." *Mescalero Apache Tribe*, 462 U.S. at 332 (quoting *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973)). Rather, it would be consistent with the rule that "'Indians going beyond reservation boundaries' are subject to any generally applicable state law." *Bay Mills*, 134 S. Ct. at 2034 (quoting *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U.S. 95, 113 (2005)).

Indeed, when this Court reaffirmed in *Bay Mills* that tribes do not give up their sovereign immunity by engaging in off-reservation commercial activity, it emphasized that tribal officials would remain subject to state regulation and that a State would retain a "panoply of tools * * * to enforce its law on its own

lands." 134 S. Ct. at 2035. Thus, the Court noted that "tribal immunity does not bar * * * a suit for injunctive relief against *individuals*, including tribal officials, responsible for unlawful conduct." *Ibid.* The Court went on to observe that "to the extent civil remedies proved inadequate, [a State] could resort to its criminal law." *Ibid.* Consistent with *Bay Mills*, the State of Connecticut applied its criminal law to respondent after the accident at issue here: the Connecticut State Police cited him for violating Connecticut General Statutes § 14-240 by following a vehicle too closely, an infraction punishable by a fine. Resp. Conn. Super. Ct. Mot. to Dismiss, Ex. B (Dec. 31, 2013). The court below did not explain why a tribal employee engaging in off-reservation conduct should be immune from state tort law when he is subject to state criminal law.

Tort judgments are an important means by which a State "enforce[s] its law on its own lands." *Bay Mills*, 134 S. Ct. at 2035. Tort law serves not only to compensate victims of accidents but also to deter wrongful conduct. See *Restatement (Second) of Torts* § 901 (1979). As this Court has observed, "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Cipollone* v. *Liggett Grp., Inc.*, 505 U.S. 504, 521 (1992) (plurality opinion) (quoting *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959)). When a commercial enterprise enjoys sovereign immunity, it need not comply with rules of conduct established by state tort law, including taking precautions to prevent accidents, because it will not be forced to internalize the cost of its misconduct. In that con-

text, the only way to deter tortious conduct is by allowing the victims of a wrong to seek a remedy from the individuals who injured them.

4. The decision below will leave many plaintiffs who are injured by tribal employees without a remedy. There is no dispute that a tribe itself enjoys sovereign immunity, so if immunity extends to the tribe's employees, then there will be no one from whom the victims of tribal employees' torts can recover.

Of course, it is possible that some tribes may choose to waive immunity to allow tort suits. Under the Mohegan Tribal Code, for example, a person injured in circumstances such as those of this case may bring a claim in the Mohegan Gaming Disputes Court. See Mohegan Tribal Code § 3-248(a). Such a proceeding carries no right to a jury trial, and any award is subject to strict limits on non-economic damages and to a prohibition on punitive damages and damages for loss of consortium. Mohegan Tribal Code §§ 3-248(d), 3-251(a)(1)-(3). In addition, a claimant's potential recovery is capped at the limit of any liability insurance policy the Tribe happens to maintain. Mohegan Tribal Code § 3-251(a)(4). More importantly, that remedy exists only at the grace of the Tribe, and under the decision below, sovereign immunity extends to the Tribe's employees whether or not the Tribe chooses to make a tort claim procedure available. Many tribes in the United States have no tort claim procedure, and many do not maintain tribal courts. Victims of torts committed by those tribes' employees will be left with no avenue for relief.

In the context of commercial disputes, the potential for unfairness of a broad application of tribal sovereign

immunity may be limited because parties dealing with tribes can contract for a waiver of immunity. See, *e.g.*, *C & L Enters., Inc.* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (tribe waived immunity by agreeing to a contract with an arbitration clause). Similarly, as this Court observed in *Bay Mills*, a State seeking the ability to sue a tribe "need only bargain for a waiver of immunity" when negotiating a gaming compact. 134 S. Ct. at 2035. But petitioners, like most tort victims, had no opportunity to negotiate with the Tribe whose employee caused their injuries. As they were driving on a highway 70 miles from the Mohegan Tribe's casino, petitioners had no reason to anticipate that a tribal employee would run into them. It would be unfair and anomalous to apply sovereign immunity to deprive them of a remedy for their injuries.

C. The question presented is important, and this case would be a good vehicle for resolving it

1. Because the Ninth Circuit's decisions in *Maxwell* and *Pistor* and the Tenth Circuit's decision in *Native American Distributing* are consistent with this Court's cases distinguishing official-capacity from individual-capacity suits, further consideration is unlikely to lead these courts to change their positions and adopt the view of the courts that have agreed with the court below. Conversely, because several other state and federal courts have taken the Connecticut Supreme Court's side of the conflict, there is little chance that they will all change their positions. Additional consideration in the lower courts is unlikely to

resolve the conflict, and intervention by this Court is necessary.

2. As this case demonstrates, tribal commercial activity has a broad footprint outside of Indian reservations. There are now 486 tribal gaming operations in 28 States, and their gross gaming revenues are more than $28 billion each year. Nat'l Indian Gaming Comm'n, *NIGC Fact Sheet* (Aug. 2015). Those facilities employ approximately 600,000 people. H.R. Rep. No. 260, 114th Cong., 1st Sess. 21 (2015). And of course gaming is just one of the commercial activities in which tribes can engage.

As tribal commercial activity increases, interactions between tribal employees and other persons will increase as well. In those interactions, tribal employees—like any other employees—will sometimes commit torts. They can be involved in motor-vehicle accidents, as in this case; they can serve alcohol to intoxicated persons, see, *e.g.*, *Filer*, 129 P.3d at 80; they can commit employment-related torts, see, *e.g.*, *Chayoon*, 355 F.3d at 142; they can fail to prevent physical assaults, see, *e.g.*, *Trudgeon*, 84 Cal. Rptr. 2d at 66-67; or they can engage in physical altercations themselves and seize property from casino patrons, see, *e.g.*, *Pistor*, 791 F.3d at 1108-1109. The standard governing the liability of tribal employees is therefore a question with important practical consequences. In light of the division in the lower courts, that question requires resolution by this Court.

3. This Court recognized the importance of the question presented when it invited the Solicitor General's views on the petition for a writ of certiorari in *Young* v. *Fitzpatrick*, 133 S. Ct. 2848 (2013). The

plaintiff in that case was the personal representative of the estate of a man who died while being arrested by the Puyallup Tribal Police. He sought damages from the individual police officers for their alleged use of excessive force. The Washington Court of Appeals held that his claims were barred by tribal sovereign immunity, which, it said, "extends not only to the tribe itself, but also to tribal officers and tribal employees, as long as their alleged misconduct arises while they are acting in their official capacity and within the scope of their authority." *Young* v. *Duenas*, 262 P.3d at 531.

In response to this Court's invitation, the Solicitor General argued that the case did not squarely raise the question presented here. Observing that the Washington Court of Appeals had "characterized [the] suit as an 'attempt[] to sue the tribe in a civil suit in state court,'" the Solicitor General reasoned that the court "did not consider the state-law tort claims to be truly individual-capacity ones." Gov't Br. at 15, *Young* v. *Fitzpatrick*, *supra* (No. 11-1485) (quoting *Young* v. *Duenas*, 262 P.3d at 532). He also noted that the petitioner had failed to address the question whether tribal sovereign immunity can apply to individual-capacity damages actions: "[E]ven assuming that the state court's decision could be read as implicitly applying tribal sovereign immunity to state-law tort claims beyond the official-capacity context referred to in the cases on which it relied, that question is not fairly included in the question presented, nor even alluded to in the body of the petition." *Id.* at 17.

Unlike *Young*, this case squarely presents the question whether sovereign immunity applies to indi-

vidual-capacity damages actions against tribal employees. The question was briefed below and thoroughly addressed by the Connecticut Supreme Court. And because it involves a commonplace factual scenario that is likely to recur, this case would be an ideal vehicle for resolving that important legal question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2016

APPENDIX

APPENDIX A

SUPREME COURT OF CONNECTICUT

No. 19464

BRIAN LEWIS ET AL.

v.

WILLIAM CLARKE ET AL.

Argued: Dec. 15, 2015
Officially Released: Mar. 15, 2016

OPINION

Before: ROGERS, C.J., and PALMER, ZARELLA, EVELEIGH, MCDONALD, ESPINOSA, AND ROBINSON, JS.

EVELEIGH, J.

The dispositive issue in this appeal is whether the trial court properly denied the defendant William Clarke's[1] motion to dismiss the claims made by the

[1] Although Clarke's employer, the Mohegan Tribal Gaming Authority, was also named as a defendant in this case, it is not a party to the present appeal. See footnote 2 of this opinion. For the sake of simplicity, references to the defendant in this opinion are to Clarke in his individual capacity.

plaintiffs, Brian Lewis and Michelle Lewis, on the ground that tribal sovereign immunity did not apply to their claims against the defendant in his individual capacity. On appeal, the defendant asserts that the trial court improperly denied his motion to dismiss because tribal sovereign immunity barred the plaintiffs' claims against him for an accident that occurred while he was acting within the scope of his employment with the Mohegan Tribal Gaming Authority. We agree with the defendant and, accordingly, reverse the judgment of the trial court.

The following undisputed facts and procedural history are relevant to this appeal. "On October 22, 2011 . . . Brian Lewis was operating a motor vehicle southbound on [Interstate 95] in Norwalk, Connecticut. . . . Michelle Lewis was his passenger. [The defendant] was driving a limousine behind the plaintiffs. Suddenly and without warning, [the defendant] drove the limousine into the rear of the plaintiffs' vehicle and propelled the plaintiffs' vehicle forward with such force that it came to rest partially on top of a [concrete] barrier on the left-hand side of the highway. The collision and the plaintiffs' resulting injuries were caused by [the defendant's] negligence. At that time, [the defendant] was a Connecticut resident, had a Connecticut driver's license, and, according to the affidavit of Michael Hamilton, the [Mohegan Tribal Gaming Authority's director of transportation], was driving a limousine owned by the [Mohegan Tribal Gaming Authority] and was employed by the [Mohegan Tribal Gaming Authority] to do so. Specifically, [the defendant] was driving patrons of the Mohegan Sun Casino to their homes. The limousine was covered by an au-

tomobile insurance policy issued by Arch Insurance." (Footnote omitted.)

The plaintiffs filed an action against the defendant claiming, inter alia, that they sustained injuries as a result of the defendant's negligence and carelessness.[2] The defendant filed a motion to dismiss the complaint, claiming that the trial court lacked subject matter jurisdiction because he was entitled to tribal sovereign immunity. In support of his motion, the defendant filed, inter alia, the affidavit from Hamilton. The plaintiffs opposed the motion, claiming that the trial court was not without subject matter jurisdiction because the doctrine of tribal sovereign immunity does not extend to a tribal employee, who is named in his individual capacity, and the damages are sought from the employee, not from the tribe. The trial court denied the defendant's motion to dismiss, determining that it was not deprived of jurisdiction over the plaintiffs' claims under the doctrine of tribal sovereign immunity because the plaintiffs sought money damages from the defendant personally, not from the Mohegan Tribal Gaming Authority. This appeal followed.[3]

On appeal, the defendant claims that the trial court improperly denied his motion to dismiss. Specifically, the defendant asserts that the trial court improperly

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[2] Although the plaintiffs initially filed claims against the Mohegan Tribal Gaming Authority, those claims were subsequently withdrawn.

[3] The defendant appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199(c) and Practice Book § 65-1.

concluded that the doctrine of tribal sovereign immunity did not extend to the plaintiffs' claims against the defendant in the present case because they were claims against the defendant in his individual capacity. The defendant asserts that, because he was acting within the scope of his employment for the Mohegan Tribal Gaming Authority and the Mohegan Tribal Gaming Authority is an arm of the Mohegan Tribe (tribe),[4] tribal sovereign immunity bars the plaintiffs' claims against him. In response, the plaintiffs assert that the trial court properly denied the defendant's motion to dismiss. In support of their position, the plaintiffs assert that the remedy sought in their complaint was for damages against the defendant individually and, therefore, would not affect the tribe, accordingly, tribal immunity should not be extended to deprive the court of jurisdiction over their claims.

First, we must address the threshold issue of whether the decision of the trial court denying the motion to dismiss is immediately appealable. "The general rule is that the denial of a motion to dismiss is an interlocutory ruling and, therefore, is not a final judgment for purposes of appeal. . . . The denial of a motion to dismiss based on a colorable claim of sovereign immunity, by contrast, is an immediately appealable final judgment because the order or action so concludes the rights of the parties that further proceedings cannot affect them." (Internal quotation marks omitted.) *Sullins* v. *Rodriguez*, 281 Conn. 128, 130 n.2, 913 A.2d 415

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[4] The parties do not dispute that the Mohegan Tribal Gaming Authority is an arm of the tribe. Therefore, we do not address this issue.

(2007); see also *Kizis* v. *Morse Diesel International, Inc.*, 260 Conn. 46, 51, 794 A.2d 498 (2002) (denial of motion to dismiss filed by tribal employees based on tribal sovereign immunity constitutes final judgment for purpose of appeal). In the present case, because the basis of the defendant's motion to dismiss was a claim of tribal sovereign immunity, we conclude that the denial of the motion to dismiss is an immediately appealable final judgment.

Having concluded that the decision of the trial court denying the motion to dismiss is an immediately appealable final judgment, we next address the standard of review and the general principles governing a trial court's disposition of a motion to dismiss that challenges jurisdiction. The defendant's claim that the plaintiffs' claims are barred because the actions arose in the course of his employment with the Mohegan Tribal Gaming Authority is an assertion of "sovereign immunity [that] implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. . . . A determination regarding a trial court's subject matter jurisdiction is a question of law." (Internal quotation marks omitted.) *Bloom* v. *Gershon*, 271 Conn. 96, 113, 856 A.2d 335 (2004); see also *Fresenius Medical* v. *Puerto Rico Cardiovascular*, 322 F.3d 56, 61 (1st Cir.) (question of whether entity is arm of state entitled to immunity is legal one), cert. denied, 540 U.S. 878, 124 S. Ct. 296, 157 L. Ed. 2d 142 (2003). Accordingly, "[o]ur review of the court's ultimate legal conclusion[s] and resulting [determination] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *Gold* v. *Rowland*, 296 Conn. 186, 200, 994 A.2d 106 (2010).

Depending on the record before it, a trial court ruling on a motion to dismiss for lack of subject matter jurisdiction pursuant to Practice Book § 10-31(a)(1) may decide that motion on the basis of: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. . . . Different rules and procedures will apply, depending on the state of the record at the time the motion is filed." (Citation omitted; internal quotation marks omitted.) *Conboy* v. *State*, 292 Conn. 642, 651, 974 A.2d 669 (2009).

If the trial court decides the motion "on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . .

"In contrast, if the complaint is supplemented by *undisputed facts* established by affidavits submitted in support of the motion to dismiss . . . other types of undisputed evidence . . . [or] public records of which judicial notice may be taken . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits [or] other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking,

and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings. . . . If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint, but may rest on the jurisdictional allegations therein. . . .

"Finally, where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . . Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits. . . . An evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties." (Citations omitted; emphasis in original; footnotes omitted; internal quotation marks omitted.) Id., 651–54; see also *Rocky Hill* v. *SecureCare Realty, LLC*, 315 Conn. 265, 277–78, 105 A.3d 857 (2015).

It is well established that "Indian tribes are domestic dependent nations that exercise inherent sovereign authority. *Oklahoma Tax [Commission]* v. *Citizen Band Potawatomi Tribe of [Oklahoma]*, 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991) . . . . As dependents, the tribes are subject to plenary control by Congress. See *United States* v. *Lara*, 541 U.S. 193,

200, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004) ([t]he [c]onstitution grants Congress powers we have consistently described as plenary and exclusive to legislate in respect to Indian tribes). And yet they remain separate sovereigns [preexisting] the [c]onstitution. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). Thus, unless and until Congress acts, the tribes retain their historic sovereign authority. *United States* v. *Wheeler*, 435 U.S. 313, 323, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978).

"Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the common-law immunity from suit traditionally enjoyed by sovereign powers. . . . That immunity, we have explained, is a necessary corollary to Indian sovereignty and self-governance. *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P.C.*, 476 U.S. 877, 890, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986); cf. The Federalist No. 81, p. 511 (B. Wright ed. 1961) ([Alexander] Hamilton) ([i]t is inherent in the nature of sovereignty not to be amenable to suit without consent). And the qualified nature of Indian sovereignty modifies that principle only by placing a tribe's immunity, like its other governmental powers and attributes, in [Congress'] hands. See *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512, 60 S. Ct. 653, 84 L. Ed. 894 (1940) . . . ([i]t is as though the immunity which was theirs as sovereigns passed to the United States for their benefit)." (Citations omitted; internal quotation marks omitted.) *Michigan* v. *Bay Mills Indian Community*, U.S. , 134 S. Ct. 2024, 2030, 188 L. Ed. 2d 1071 (2014).

The United States Supreme Court has recently explained that the "baseline position . . . is tribal immunity; and [t]o abrogate [such] immunity, Congress must unequivocally express that purpose. . . . That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." (Citations omitted; internal quotation marks omitted.) Id., 2031–32.

In the present case, the plaintiffs' complaint contained two counts. Both counts originally named both the defendant and the Mohegan Tribal Gaming Authority. Prior to the defendant filing his motion to dismiss, the plaintiffs withdrew all of their claims against the Mohegan Tribal Gaming Authority. Therefore, in deciding the motion to dismiss, the only issue before the trial court was whether the doctrine of tribal sovereign immunity barred the plaintiffs' claims against the defendant in his individual capacity.

As we explained previously in this opinion, "if the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . [or] other types of undisputed evidence . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts . . . ." (Citations omitted; emphasis omitted; footnote omitted.) *Conboy* v. *State*, supra, 292 Conn. 651–52.

In their complaint, the plaintiffs themselves alleged that "at all relevant times herein, [the defendant] was acting in the scope of his employment with the Mohe-

gan Tribal Gaming Authority and was driving said vehicle with the permission of the Mohegan Tribal Gaming Authority as its [employee, agent or servant]." Furthermore, accompanying his motion to dismiss, the defendant filed the affidavit from Hamilton, which averred that the defendant was driving a limousine owned by the Mohegan Tribal Gaming Authority at the time of the accident. Hamilton further averred that the defendant was employed by the Mohegan Tribal Gaming Authority to use the limousine to drive patrons of the Mohegan Sun Casino to their homes. The plaintiffs did not present any evidence that the defendant was acting outside the scope of his employment at the time of the accident. Therefore, the undisputed facts establish that the defendant was acting within the scope of his employment when the accident that injured the plaintiffs occurred.[5]

It is well established that "[t]he doctrine of tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority." (Internal quotation marks omitted.) *Romanella* v. *Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996), aff'd, 114 F.3d 15 (2d Cir. 1997), citing F. Cohen, Federal Indian Law (1986) p. 284 ("it has been held that where the tribe itself is not subject to suit, tribal officers cannot be [held liable] on the basis of

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[5] The plaintiffs do not assert that tribal sovereign immunity is inapplicable in the present case because the accident occurred outside of the reservation. Therefore, we do not address the issue of whether, and to what extent, a tribe is immune from liability arising out of commercial activities that occur outside the reservation.

tribal obligations"); see *Romanella* v. *Hayward*, supra, 167 ("[The plaintiff's] action against the tribal officers is a suit against the tribe. As such, the individual defendants' immunity from suit is coextensive with the [t]ribe's immunity from suit."); see also, e.g., *Hardin* v. *White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir. 1985); *Tenneco Oil Co.* v. *Sac & Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir. 1984). Indeed, this court has also recognized that tribal immunity extends to individual tribal officials and employees acting within the scope of their authority. *Kizis* v. *Morse Diesel International, Inc.*, supra, 260 Conn. 54.

The United States Court of Appeals for the Second Circuit has also addressed the implications of tribal immunity in actions against individual employees of the tribe. In *Chayoon* v. *Chao*, 355 F.3d 141 (2d Cir. 2004), cert. denied sub nom. *Chayoon* v. *Reels*, 543 U.S. 966, 125 S. Ct. 429, 160 L. Ed. 2d 336 (2004), the plaintiff appealed the dismissal of certain employment claims against several individuals who were either on the Mashantucket Pequot Tribal Council or were officers or employees of Mashantucket Pequot Gaming Enterprise, which operates the gaming facility known as Foxwoods Resort Casino. The Second Circuit rejected the plaintiff's claims, concluding that "Indian tribes enjoy the same immunity from suit enjoyed by sovereign powers and are 'subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.' . . . Furthermore, [the plaintiff] cannot circumvent tribal immunity by merely naming officers or employees of the [t]ribe when the complaint concerns actions taken in [the] defendants' official or representative capacities and the complaint does not al-

lege they acted outside the scope of their authority." (Citations omitted.) Id., 143.

Similarly, the United States District Court for the District of Connecticut has also examined whether the doctrine of tribal immunity extended to claims for damages against two employees of the Mashantucket Pequot Museum and Research Center, Inc., where the complaint alleged that they were being named, inter alia, in their "individual capacities." *Bassett* v. *Mashantucket Pequot Museum & Research Center, Inc.*, 221 F. Supp. 2d 271, 274 (D. Conn. 2002). In addressing the claims against the employees in their individual capacities, the court explained that "[i]n the tribal immunity context, a claim for damages against a tribal official lies outside the scope of tribal immunity *only where the complaint pleads—and it is shown—that a tribal official acted beyond the scope of his authority to act on behalf of the [t]ribe.*" (Emphasis added.) Id., 280; see *Garcia* v. *Akwesasne Housing Authority*, 105 F. Supp. 2d 12, 18 (N.D.N.Y. 2000) (stating that personal capacity claim may proceed against tribal official if allegations indicate that tribal official acted outside scope of delegated authority), vacated on other grounds, 268 F.3d 76 (2d Cir. 2001); see also *Puyallup Tribe, Inc.* v. *Washington Game Dept.*, 433 U.S. 165, 170–73, 97 S. Ct. 2616, 53 L. Ed. 2d 667 (1977) (claim permitted against tribal officials, who were acting as fishermen, rather than tribal government officers when they had engaged in challenged activities).

The District Court further explained that "[c]laimants may not simply describe their claims against a tribal official as in his 'individual capacity' in

order to eliminate tribal immunity. . . . Permitting such a description to affect tribal immunity would eviscerate its protections and ultimately subject [t]ribes to damages actions for every violation of state or federal law. The sounder approach is to examine the actions of the individual tribal defendants. Thus, the [c]ourt holds that a tribal official—even if [named] in his 'individual capacity'—is only 'stripped' of tribal immunity when he acts 'manifestly or palpably beyond his authority . . . .'" (Emphasis omitted.) *Bassett* v. *Mashantucket Pequot Museum & Research Center, Inc.*, supra, 221 F. Supp. 2d 280; see also *Sue/Perior Concrete & Paving, Inc.* v. *Seneca Gaming Corp.*, 99 App. Div. 3d 1203, 1204, 952 N.Y.S.2d 353 (2012) ("[a]lthough tribal immunity does not necessarily extend to individual members of the tribe . . . it does as a rule [extend] to individual tribal officials acting in their representative capacity and within the scope of their authority" [citations omitted; internal quotation marks omitted]); *Gooding* v. *Ketcher*, 838 F. Supp. 2d 1231, 1246 (N.D. Okla. 2012) ("[a] tribal official, even if [named] in an individual capacity, is only stripped of tribal immunity when he acts without any colorable claim of authority" [internal quotation marks omitted]).

Nevertheless, the plaintiffs assert, and the trial court agreed, that the doctrine of tribal immunity should not be applied in the present case. Specifically, the plaintiffs assert that the doctrine of tribal immunity does not apply in the present case because the tribe is neither a party, nor the real party in interest because the remedy sought will be paid by the defendant himself, and not the tribe. In support of their claim,

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the plaintiffs cite and the trial court relied on *Maxwell* v. *San Diego*, 708 F.3d 1075 (9th Cir. 2013).

In *Maxwell*, family members of a shooting victim brought an action alleging that the victim had been delayed medical treatment. Id., 1079–81. The United States Court of Appeals for the Ninth Circuit reversed the decision of the trial court dismissing an action against paramedics employed by a tribal fire department. Id., 1081. In reversing the trial court's judgment, the Ninth Circuit concluded that tribal immunity did not bar the claims against the paramedics because "a remedy would operate against them, not the tribe." Id., 1087. The Ninth Circuit explained that because the plaintiffs had brought an action against the tribal paramedics in their individual capacities for money damages, "[a]ny damages will come from [the paramedics'] own pockets, not the tribal treasury." Id., 1089.

We reject the plaintiffs' invitation to apply *Maxwell* in the present case. The Ninth Circuit acknowledged that *Maxwell* concerned "allegedly grossly negligent acts committed outside tribal land pursuant to an agreement with a [nontribal] entity." Id., 1090. The fact that the allegations against the plaintiffs in *Maxwell* involved claims of gross negligence makes the Ninth Circuit's holding in that case distinguishable from the present case. Actions involving claims of more than negligence are often deemed to be outside the scope of employment and, therefore, not subject to sovereign immunity. See, e.g., *Gedrich* v. *Dept. of Family Services*, 282 F. Supp. 2d 439, 474–75 (E.D. Va. 2003) ("[t]he doctrine of sovereign immunity does

not shield state employees from liability for acts or omissions constituting gross negligence"); *Young* v. *Mount Ranier*, 238 F.3d 567, 578 (4th Cir. 2001) (discussing Maryland statute providing that "state personnel are immune from suit and from liability for tortious conduct committed within the scope of their public duties and without malice or gross negligence" [footnote omitted]); see also General Statutes § 4-165 ("[n]o state officer or employee shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his or her duties or within the scope of his or her employment").[6]

Indeed, even the Ninth Circuit does not always follow the approach applied in *Maxwell*. See, e.g., *Murgia* v. *Reed*, 338 Fed. Appx. 614, 616 (9th Cir. 2009). In *Murgia*, the Ninth Circuit explained that "[t]he [trial]

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[6] The Ninth Circuit recently followed the *Maxwell* "remedy sought" approach in the case of *Pistor* v. *Garcia*, 791 F.3d 1104, 1109 (9th Cir. 2015). In *Pistor*, the Ninth Circuit concluded that tribal immunity did not extend to employees of a tribe who had an action brought against them for working with local police to seize gamblers at the casino and steal their property. Id., 1108–1109. Once again the decision of the Ninth Circuit not to apply tribal immunity to the defendants is distinguishable because their actions were beyond the scope of their authority. Indeed, the plaintiffs in *Pistor* alleged that the tribal employees developed a scheme with local police "concocted with the goal of punishing plaintiffs for winning so much at . . . [their casino], and the hope of stealing back some of the funds that the plaintiffs had legitimately won." (Internal quotation marks omitted.) Id., 1109. Like *Maxwell*, the facts of *Pistor* are distinguishable from the present case, where there is no allegation that the defendant was acting outside the scope of his employment or in a grossly negligent manner.

court erred in concluding that tribal sovereign immunity did not apply solely because the [d]efendants were [named] in their individual capacities. In our circuit, the fact that a tribal officer is [named] in his individual capacity does not, without more, establish that he lacks the protection of tribal sovereign immunity. . . . If the [defendant tribal employees] were acting for the tribe within the scope of their authority, they are immune from [the plaintiff's claims] regardless of whether the words 'individual capacity' appear on the complaint." (Citation omitted.) Id. Similarly, in an opinion published approximately one month before *Maxwell*, the Ninth Circuit explained that a tribe's sovereign immunity "extends to its officials who were acting in their official capacities and within the scope of their authority when they taxed transactions occurring on the reservation." *Miller* v. *Wright*, 705 F.3d 919, 928 (9th Cir. 2013). Furthermore, no other jurisdictions have adopted the "remedy sought" approach applied in *Maxwell*.

On the basis of the foregoing, we conclude that the doctrine of tribal sovereign immunity extends to the plaintiffs' claims against the defendant because the undisputed facts of this case establish that he was an employee of the tribe and was acting within the scope of his employment when the accident occurred. We agree with the United States District Court of the District of Connecticut that the plaintiffs cannot circumvent tribal immunity by merely naming the defendant, an employee of the tribe, when the complaint concerns actions taken within the scope of his duties and the complaint does not allege, nor have the plaintiffs offered any other evidence, that he acted outside

the scope of his authority. See *Chayoon* v. *Chao*, supra, 355 F.3d 143. Accordingly, we conclude that the trial court improperly determined that tribal sovereign immunity did not extend to the defendant in the present case and, therefore, improperly denied the defendant's motion to dismiss the plaintiffs' complaint.

The judgment is reversed and the case is remanded with direction to grant the defendant's motion to dismiss.

In this opinion the other justices concurred.

APPENDIX B

CONNECTICUT SUPERIOR COURT
J.D. NEW LONDON
AT NEW LONDON

No. KNL CV-13-6019099-S

BRIAN LEWIS AND MICHELLE LEWIS,
PLAINTIFFS,

v.

WILLIAM CLARKE,
DEFENDANT.

Sept. 10, 2014

MEMORANDUM OF DECISION ON MOTION TO DISMISS (#104.00)

The plaintiffs, Brian Lewis and Michelle Lewis, initiated this suit by way of complaint filed on October 21, 2013, against William Clarke and the Mohegan Tribal Gaming Authority (MTGA). Two days later, on October 23, 2013, before the return date, the plaintiffs withdrew the action as to the MTGA. On November 19, 2013, William Clarke appeared by counsel. The next day, the plaintiffs filed an amended complaint in

two counts, one each by Brian Lewis and Michelle Lewis against Clarke only ("the complaint").[1]

On December 31, 2013, Clarke moved to dismiss the complaint. Filed with the motion were an affidavit of Michael Hamilton, a copy of a police report on the subject accident, portions of the Mohegan Tribe of Indians Code and a copy of the Tribal State Compact between the Mohegan Tribe and State of Connecticut. The plaintiffs filed an objection to the motion to dismiss on January 6, 2014. Clarke filed a reply memorandum to the plaintiffs' objection on February 11, 2014, attaching a copy of the Mohegan Tribal Code §§ 4-52 and 4-53 and an Affidavit of Mary Lou Morrissette. On February 14, 2014, the plaintiffs filed a surreply. The motion was argued on February 28, 2014.[2] Also on that day, Clarke filed supplemental authorities discussed at oral argument but not included in the briefs. On February 25, 2014, the plaintiffs filed a response to Clarke's supplemental authorities.

FACTS

In deciding a jurisdictional question raised by a motion to dismiss, the court takes the facts to be those alleged, and necessarily implied, in the complaint, construing them in a manner most favorable to the pleader. *Lagassey v. State*, 268 Conn. 723, 736, 846 A.2d 831

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[1] On February 21, 2014, the plaintiffs filed another request for leave to amend their complaint, which request was denied by this court on March 25, 2014, without prejudice to renewal after issuance of this decision on the defendant's motion to dismiss.

[2] The parties filed written waivers of the 120-day deadline for this decision, for which the court thanks them and their respective counsel.

(2004). Legal conclusions and opinions are not taken as true. See *Ellef v. Select Committee of Inquiry*, Superior Court, judicial district of Hartford, Docket No. CV-04-0832432-S (April 8, 2004). The interpretation of pleadings is always a question of law for the court. *Boone v. William W. Backus Hospital*, 272 Conn. 551, 559 n.1, 864 A.2d 1 (2005). Viewing the complaint in this light, the essential facts are as follows.

On October 22, 2011, the plaintiff Brian Lewis was operating a motor vehicle southbound on Interstate Route 95 in Norwalk, Connecticut. The plaintiff Michelle Lewis was his passenger. Clarke was driving a limousine behind the plaintiffs. Suddenly and without warning, Clarke drove the limousine into the rear of the plaintiffs' vehicle and propelled the plaintiffs' vehicle forward with such force that it came to rest partially on top of a jersey barrier on the left hand side of the highway. The collision and the plaintiffs' resulting injuries were caused by Clarke's negligence. At that time, Clarke was a Connecticut resident, had a Connecticut driver's license, and, according to the affidavit of Michael Hamilton, the MTGA's Director of Transportation, was driving a limousine owned by the MTGA and was employed by the MTGA to do so.[3] Specifically, Clarke was driving patrons of the Mohegan Sun Casino to their homes. The limousine was

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[3] "[I]f the complaint is supplemented by *undisputed facts* established by affidavits submitted in support of the motion to dismiss [or] other types of undisputed evidence . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Conboy v. State*, 292 Conn. 642, 651-52, 974 A.2d 669 (2006).

covered by an automobile insurance policy issued by Arch Insurance.

DISCUSSION

"[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss." (Internal quotation marks omitted.) *Beecher v. Mohegan Tribe of Indians of Connecticut*, 282 Conn. 130, 134, 918 A.2d 880 (2007). The party who is asking the court to exercise jurisdiction in his favor must be able to allege facts demonstrating that he is a proper party to make that request. See *St. Paul Travelers Cos. v. Kuehl*, 299 Conn. 800, 808, 12 A.3d 852 (2011). The plaintiff, therefore, bears the burden of proving subject matter jurisdiction. *Fort Trumbull Conservancy, LLC v. New London*, 265 Conn. 423, 430 n.12, 829 A.2d 801 (2003). In determining whether a court has subject matter jurisdiction, every appropriate presumption favors finding such jurisdiction. *Keller v. Beckenstein*, 305 Conn. 523, 531, 46 A.3d 102, 107 (2012).

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." (Internal quotation marks omitted.) *Kizis v. Morse Diesel International, Inc.*, 260 Conn. 46, 52, 794 A.2d 498 (2002). "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998). "'Absent a clear and unequivocal waiver by the tribe or congressional abrogation, the doctrine of sovereign immunity

bars suits for damages against a tribe.' *Romanella v. Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996). 'However, such waiver may not be implied, but must be expressed unequivocally.' *McClendon v. United States*, 885 F.2d 627, 629 (9th Cir. 1989)." *Kizis v. Morse Diesel International, Inc.*, supra, 53. The tribe must have consented to suit in the specific forum. Id., 53, citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978).

THE PARTIES' CLAIMS

Clarke moves to dismiss the complaint on the ground that the court lacks subject matter jurisdiction because the MTGA is entitled to sovereign immunity, as an entity of the Mohegan Tribe of Indians of Connecticut ("Mohegan Tribe" or "the tribe"), and he is entitled to sovereign immunity as an employee of the MTGA acting within the scope of his employment at the time of the accident. Clarke argues that to deny the present motion would be to abrogate the MTGA's sovereign immunity, and that only the Congress of the United States has that power. Clarke argues that dismissal of this case would not leave the plaintiffs without recourse because they can sue him in the Mohegan Tribal Gaming Court.

The plaintiffs oppose Clarke's motion based on an emerging "remedy-sought" doctrine promulgated by the Ninth and Tenth Circuits of the United States Courts of Appeal. The essence of the "remedy-sought" doctrine is that sovereign immunity does not extend to a tribal employee who is sued in his individual capacity when damages are sought from the employee, not from the tribe, and will in no legally cognizable way

affect the tribe's ability to govern itself independently. The plaintiffs claim that, even treating the MTGA as the Mohegan Tribe, their suit against Clarke individually would not infringe on the tribe's sovereign immunity and therefore, immunity should not be extended to him. Essentially, the plaintiffs argue that the tribe's sovereign immunity is limited; that, in a civil context, tribal immunity prevents only claims and judgments for money against the tribe or the MTGA; and that there is no such claim here, nor any possibility of such a judgment. The plaintiffs urge the court to adopt the remedy-sought analysis applied in *Maxwell v. County of San Diego*, 697 F.3d 941 (9th Cir. 2012), and find that a tribal employee can be sued in his individual capacity so long as the remedy sought is against the employee individually.[4]

Clarke replies that, in our federal circuit – the United States Court of Appeals for the Second Circuit – and under Connecticut law, it is well settled that tribal employees are immune from suit when acting within the scope of their employment, even where a tribal employee is the sole defendant, and that it is unnecessary and inappropriate to examine whether the tribe is a real party in interest. See *Chayoon v. Sherlock*, 89 Conn. App. 821, 877 A.2d 4, cert. denied, 276 Conn. 913, 888 A.2d 83 (2005). Clarke argues that this court should heed the Tenth Circuit's caution, in

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[4] The plaintiffs have cited to the *Maxwell v. County of San Diego* opinion appearing at 697 F.3d 941 (9th Cir. 2012). That opinion, however, has been withdrawn by *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013). Accordingly, this court relies on the latter opinion.

Native American Distributing v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288, 1297 (10th Cir. 2008), that adoption of the remedy-sought analysis would be like wading into a swamp and reject that analysis. Finally, Clarke claims that, even if this court applies the "remedy-sought" analysis, he would still be immune from suit because the MTGA is the real party in interest by virtue of its commitment to indemnify and defend him, its employee.

In the plaintiffs' sur-reply, they argue that the facts of this case differ from those in *Chayoon v. Sherlock*, supra, 89 Conn. App. 821. The plaintiffs contend that tribal immunity is not attached to an individual employee sued in his individual capacity. They argue that *Chayoon* is distinguishable because the court found, despite the plaintiff's claim, tribal employees were being sued, in part, in their roles as tribal representatives. See *Chayoon v. Sherlock*, supra, 89 Conn. App. 829 (saying defendant is being sued individually does not make it so). The plaintiffs distinguish *Bassett v. Mashantucket Pequot Museum & Research Center*, Inc., 221 F. Supp. 2d 271, 277-78 (D. Conn. 2002), also cited by Clarke, because the complaint in *Bassett* alleged that the tribal employees were being sued "individually and as an authorized agent of the Tribe as well as in their capacities as officers, representatives and/or agents of the [tribal] corporation and/or association."

At oral argument, Clarke cited *Tonasket v. Sargent*, 510 Fed. Appx. 648 (9th Cir., 2013), and *Miller v. Wright*, 705 F.3d 919 (9th Cir., 2013), for the proposition that the remedy-focused analysis employed in

Maxwell has been abandoned. The plaintiffs' dispute that proposition because *Tonasket* and *Miller* did not address the present issue: those decisions involved the execution of a cigarette tax upon a tribal reservation.

ANALYSIS

At the outset, there is no claim by the plaintiffs that the MTGA has waived sovereign immunity or that Clarke has waived his claim to sovereign immunity. Nor does this court perceive that it has any power to "abrogate sovereign immunity" or otherwise assume any power or right reserved to the tribe, let alone to the United States Congress. Rather, the issue presented is whether the MGTA's immunity protects its employee, Clarke, from being sued solely in his individual capacity for an alleged tort occurring off the tribal reservation injuring non-patrons of the MTGA. In other words, the issue is not whether the court has the power to abrogate sovereign immunity, but whether sovereign immunity is present at all. Under the facts of this case, the court concludes that the "remedy-sought" analysis should be applied and, because the remedy sought is not against the MTGA, Clarke is not immune from suit.

Tribal sovereign immunity is limited. "[T]ribal sovereignty is dependent upon, and subordinate to ... the [f]ederal [g]overnment." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980). "The [tribal] sovereign's claim to immunity in the courts of a second sovereign . . . normally depends on the second sovereign's law. *Schooner Exchange v. McFadden*, 7 Cranch 116, 136 (1812)." *Kiowa Tribe of Oklahoma v.*

Manufacturing Technologies, Inc., supra, 523 U.S. 760-61 (*Stevens, J.*, dissenting). Tribal immunity "exists only at the sufferance of Congress and *is subject to complete defeasance.*" (Emphasis in original; internal quotation marks omitted.) *Rice v. Rehner*, 463 U.S. 713, 724, 103 S. Ct. 3291, 77 L. Ed. 2d 961 (1993). Congress has restricted tribal immunity to matters involving tribal self-governance. *Turner v. United States*, 248 U.S. 354, 358, 39 S. Ct. 109, 63 L. Ed. 291 (1919); *Strate v. A-1 Contractors*, 520 U.S. 438, 459, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997) (immunity has not been extended beyond protecting tribal self government or controlling internal relations); *Rice v. Rehner*, supra, 724 (immunity limited to actions promoting powers such as self-sufficiency and economic development traditionally reserved to the tribe).

In *Maxwell*, the key Ninth Circuit case applying the "remedy-sought" doctrine, a Viejas tribal fire department ambulance with two tribal employee paramedics was dispatched to the scene of a shooting at the plaintiffs' residence, which was not on the Viejas Indian Reservation. *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013). Following the death of the patient, the plaintiffs brought state law tort claims against the tribal paramedics, individually. Although the Viejas Fire Department was also a defendant, the Viejas Tribe was not a party to the suit.

Carefully considering the purposes of tribal sovereign immunity, the court in *Maxwell* applied a remedy focused analysis, seeking to identify the real party in interest. Id., 1087-1090. The *Maxwell* court determined that the tribal paramedics were not entitled to

immunity because the remedy sought by the plaintiffs would operate only against them personally. Id., 1088. Underlying the test applied in *Maxwell* was the consideration that the court "must be sensitive to whether the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act." (Internal quotation marks omitted.) Id., 1088.

"Tribal sovereign immunity derives from the same common law immunity principles that shape state and federal sovereign immunity. See *Santa Clara Pueblo v. Martinez*, [supra, 436 U.S. 58]; *Cook* [*v. Avi Casino Enterprises, Inc.*, 548 F.3d 718, 727 (9th Cir. 2008)]. Normally, a suit like this one – brought against individual officers in their individual capacities – does not implicate sovereign immunity." *Maxwell v. County of San Diego*, supra, 708 F.3d 1088, citing *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1190 (9th Cir. 2003). The plaintiffs in this case seek money damages not from the sovereign Mohegan Tribe but from Clarke personally. See *Alden v. Maine*, 527 U.S. 706, 757, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999) (states' immunity from private suit in their own courts distinguished from suits against states' employees). The essential nature and effect of the relief sought can mean that the sovereign is not the real, substantial party in interest. See *Maxwell v. County of San Diego*, supra, 1088, citing *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464, 65 S. Ct. 347, 89 L. Ed. 389 (1945).

Several years before *Maxwell*, the Tenth Circuit stated, "[w]here a suit is brought against the agent or official of a sovereign, to determine whether sovereign immunity bars the suit, we ask whether the sovereign is the real, substantial party in interest. *Frazier v. Simmons*, 254 F.3d 1247, 1253 (10th Cir. 2001) . . . This turns on the relief sought by the plaintiffs. Id. . . . '[T]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.' *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101, 104 S. Ct. 900 79 L. Ed. 2d 67 (1984) . . . . Where, however, the plaintiffs' suit seeks money damages from the officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, sovereign immunity does not bar the suit so long as the relief is sought not from the [sovereign's] treasury but from the officer personally.' *Alden v. Maine*, [supra, 527 U.S. 757]." (Citations omitted; internal quotation marks omitted.) *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, supra, 546 F.3d 1296-97; see also *Nahno-Lopez v. Houser*, 627 F. Supp. 2d 1269, 1285 (W.D. Okla. 2009) (claims against individuals are not barred if damages are clearly not sought from the tribe). "The general bar against official-capacity claims . . . does not mean that tribal officials are immunized from individual-capacity suits *arising out of* actions they took in their official capacities . . . ." (Emphasis in original.) *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, supra, 1296. "Rather, it means that tribal officials are immunized from suits brought against them *because of* their official capacities – that is, because the powers

they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe." (Emphasis in original.) Id., 1296.

Clarke argues that, in *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, supra, 546 F.3d 1288, the Tenth Circuit likened the remedy-sought analysis to wading into a swamp. That argument is a mischaracterization. In fact, the Tenth Circuit stated: "[w]e need not wade into this swamp [of analyzing who is the real party in interest] . . . because a close reading of the plaintiffs' complaint makes clear that plaintiffs have failed to state a claim against the Individual Defendants in their individual capacities." Id., 1297. A close reading of the complaint in this case reveals that Clarke is only being sued in his individual capacity. The interpretation of pleadings is always a question of law for the court. *Boone v. William W. Backus Hospital*, supra, 272 Conn. 559.

Clarke argues that *Johns v. Voebel*, Superior Court, judicial district of New Haven, Docket No. CV-11-6017037-S (September 23, 2011), in which the complaint was dismissed on sovereign immunity grounds, is analogous to the present case. It is true that, in *Johns*, the plaintiff sued a driver employed by the MTGA who, off the tribal reservation, struck the plaintiff's vehicle. *Johns* is distinguishable from this case because the question of whether the tribal employee was being sued solely in his individual capacity was apparently neither raised nor considered by the court. The plaintiff in *Johns* conceded there was sovereign immunity: the issue was whether the tribal em-

ployee driver was acting outside the scope of his authority.

The defendant claims that *Bassett v. Mashantucket Pequot Museum & Research Center, Inc.*, supra, 221 F. Supp. 2d 271, and *Chayoon v. Sherlock*, supra, 89 Conn. App. 821, require a different analysis and dismissal of this case. While the plaintiffs' claims in both those cases were dismissed on sovereign immunity grounds, the defendants were tribal employees sued under theories of vicarious tribal liability. The complaint in *Chayoon* stated that the tribal employees were being sued individually as well as in their "professional capacities." *Chayoon v. Sherlock*, supra, 828. In *Bassett*, the District Court found that the defendants were being sued "in their official capacities as officers, representatives, and/or agents of the Tribe." *Bassett v. Mashantucket Pequot Museam and Research Center, Inc.*, supra, 276 n.9. In *Chayoon* and *Bassett*, both of which predate *Native American Distributing*, *Nahno-Lopez v. Houser*, supra, and *Maxwell*, tribal employees were sued in their official capacities. Because it was clear that at least part of the remedy sought was against a sovereign, it was unnecessary to analyze whether there was *no* remedy sought against a sovereign. Compare *Maxwell v. San Diego*, supra, 708 F.3d 1088 (when a case is an official capacity suit, the remedy-sought analysis is not necessary), with *Cook v. Avi Casino Enterprises, Inc.*, supra, 548 F.3d 718 (sovereign immunity barred suit where real defendant in interest was the tribe).

Clarke also relies upon *Kizis v. Morse Diesel International, Inc.*, supra, but *Kizis* was an action resulting

from a fall at the Mohegan Sun Casino, not off the reservation. *Kizis v. Morse Diesel International, Inc.*, supra, 260 Conn. 48-49. Accordingly, *Kizis* is readily distinguishable from the present case. Noting that "[t]he tribe has not consented to state jurisdiction over private actions involving matters that occurred *on tribal land* . . ." the court held that "in this instance, the statutes and compacts cited previously, which have been recognized by both the federal government and the state of Connecticut through compliance with the procedures set forth in the gaming act and the Indian Civil Rights Act, explicitly place the present type of tort action in the jurisdiction of the tribe's Gaming Disputes Court." (Emphasis added; footnote omitted.) Id., 57-58. The facts of *Kizis* make it unilluminating to the present case, in which Clarke is alleged to have driven a limousine on non-tribal land into the vehicle of the plaintiffs, who were not invitees of the tribal casino.

The following Superior Court cases are, contrary to the defendant's claim, not inconsistent with the remedy-sought analysis because their facts and claims are distinguishable. In *Durante v. Mohegan Tribal Gaming Authority*, Superior Court, Complex Litigation Docket, judicial district of Hartford, Docket No. X04-HHD-CV-11-6022130-S (March 30, 2012), the plaintiff was killed in an automobile accident by a drunk driver who had been served alcohol at the Mohegan Sun Casino and brought suit against the MGTA, the chief executive officer of the MGTA, the chairman of the Mohegan Tribal Counsel, and the permittee of a night club at the tribal casino. Likewise, in *Ross v. Spaziante*, Superior Court, judicial district of New London,

Docket No. CV-10-6003909-S (November 1, 2011), the plaintiffs filed suit against the MTGA, the permittee of a tribal casino bar, and others following an automobile accident involving a patron of the bar. Unlike in *Durante* and *Ross*, the MTGA is not a party to this suit and the claims here are not brought against high-ranking tribal officials, as in *Durante*, or based on Dram Shop Act liability of a tribal casino bar, as in *Ross*. In *Vanstaen-Holland v. La Vigne*, Superior Court, judicial district of New London, Docket No. CV-08-5007659-S (February 26, 2009) (47 Conn. L. Rptr. 306), the plaintiffs sued the permittee, the owner, and an employee of an establishment at the Mohegan Sun Casino for reckless service of alcohol to a patron. Again, in *Vanstaen-Holland*, the MTGA was a defendant. *Vanstaen-Holland* does not hold that every tribal employee, as distinguished from officers, is entitled to immunity from personal lawsuits wherever and whenever he or she is working for the tribe.

In the other Superior Court cases cited by Clarke in support of his motion, *McAllister v. Valentino*, Superior Court, judicial district of Fairfield, Docket No. CV-11-5029414-S (April 10, 2012), and *International Motor Cars v. Sullivan*, Superior Court, judicial district of New Britain, Docket No. CV-05-4005168-S (June 20, 2006) (41 Conn. L. Rptr. 559), it was held that sovereign immunity operated to bar suits against Connecticut state marshals, based on several factors including finding no allegations that the respective marshals were being sued in their individual capacities and that the sovereign – the state – was therefore the real party in interest. While *McAllister* and *International Motor Cars* involved claims of state, not tribal,

sovereign immunity, those decisions essentially applied the remedy-sought analysis, without that label.

Turning in another direction for illumination, federal employees may be sued individually for money damages even though the actions giving rise to the claim were done while they were acting within the duties of their employment. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). This court is unpersuaded that Clarke's claim to immunity is stronger than that of federal employees. "We see no reason to give tribal officers broader sovereign immunity protections than state or federal officers given that tribal sovereign immunity is coextensive with other common law immunity principles. See *Santa Clara Pueblo*, [supra, 436 U.S. 58] . . . ." *Maxwell v. County of San Diego*, supra, 708 F.3d 1089. Mohegan tribal employees are not "absolutely immune from suit" in Connecticut courts. *Wallet v. Anderson*, 198 F.R.D. 20 (D. Conn. 2000).

Connecticut law includes clear criteria for determining the party against whom relief is being sought. "[The Connecticut Supreme Court has] identified the following criteria for determining whether an action against an individual is, in effect, against the state and barred by the doctrine of sovereign immunity: (1) a state official has been sued; (2) the suit concerns some manner in which that official represents the state; (3) the state is the real party in interest against whom relief is sought; and (4) the judgment, though nominally against the official, will operate to control the activities of the state or subject it to liability." (Internal

quotation marks omitted.) *Gordon v. H.N.S. Management Co.*, 272 Conn. 81, 93-94, 861A.2d 1160 (2004). "If the plaintiff's complaint reasonably may be construed to bring claims against the defendants in their individual capacities, then sovereign immunity would not bar those claims." *Miller v. Egan*, 265 Conn. 301, 307, 828 A.2d 549 (2003).

It is Clarke's position that, even if the "remedy-sought" analysis is applied here, the court may and should find that the MTGA is the real party in interest in this suit, so that Clarke should be protected by tribal sovereignty. Clarke asserts that, aside from the insurance policy covering the limosine,[5] the MTGA is ob-

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[5] The defendant argues that the fact that the MTGA had liability insurance on the limousine he was driving does not affect the MTGA's status as real party in interest because the MTGA has a self-insured retention and, even if it did not have that, any claim would affect the MTGA's loss history and cost of coverage. He also claims that, if a judgment were to be entered against him, it would affect the MTGA' s administration and hiring abilities, *i.e.*, that allowing this suit to proceed would discourage prospective employees from accepting employment with the MTGA – apparently because they expect, if hired by the MTGA, to be treated differently when they are alleged to have been negligent drivers than if they were employed by a non-tribe employer. Assuming these effects are real, and not conjectural, the court for two reasons rejects the defendant's claim that they show harm to the MTGA's, or the tribe's, purse or independence. First, the court finds no basis in fact, law or logic on which to conclude that these effects are significant enough to be legally cognizable. Second, considering these claims with all the defendant's claims, let alone separately, they do not meet the four-prong test for finding the MTGA or the tribe the real party in interest in this case. The defendant has not been sued as a tribal official; there is no allegation that the defendant was representing the MTGA or the tribe

ligated to defend and indemnify him pursuant to the Mohegan Tribal Code. Accordingly, just to defend Clarke, let alone pay any judgment against him, would adversely affect the MTGA's treasury. A voluntary undertaking cannot be used to extend sovereign immunity where it did not otherwise exist. See *Group Health, Inc. v. Blue Cross Association*, 625 F. Supp. 69, 76 (S.D.N.Y. 1985) (government may not, by indemnity manufacture immunity for its employees). The court finds that Clarke's claims that the MTGA is the real party in interest in this case – the third and fourth factors in *Gordon v. HNS Management Co.*, supra, 272 Conn. 93-94 – are not supported by the facts. This conclusion is strengthened by the long-standing principle that, in considering whether or not the court has subject matter jurisdiction, the plaintiff's allegations are construed in favor of finding jurisdiction where it is possible, in reason, to do so. *Stone v. Hawkins*, 56 Conn. 111, 115, 14 A. 297 (1888). To extend tribal sovereign immunity to Clarke in this case, where the effect of both the claim and any judgment on the tribal purse and self governance is self-inflicted – that is, the effect results from the MTGA's choices – is beyond the power of this court. Even if by tribal law the MTGA has to indemnify Clarke, that is a tribal choice. This court rejects Clarke's implicit claim that a sovereign may extend immunity to its employees by

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at the time of the collision (even as employee); the MGTA is not, and cannot for the reasons here stated make itself, the party against whom relief is sought; and a judgment against the defendant will not operate to control the activities of the MTGA or subject it to liability. See *Gordon v. H.N.S. Management Co.*, *supra*, 272 Conn. 93-94.

enacting a law assuming its employees' debts. See *Demery v. Kupperman*, 735 F.2d 1139, 1148 (9th Cir. 1984), cert. denied, 469 U.S. 1127, 105 S. Ct. 810, 83 L. Ed. 2d 803 (1985) (state may not extend sovereign immunity by legislation assuming employees' debts). To hold that the MTGA has the unilateral power to expand the boundaries of sovereign immunity based on tribal legislation, contract or other form of tribal indemnification of an employee, or of employees generally, is beyond the power of this court because to do so would not only be to change the law of sovereign immunity, but to do so with unknown public policy ramifications. The Mohegan Tribe, or the MTGA as its subsidiary, can elect to waive sovereign immunity, but cannot unilaterally elect to expand it.

CONCLUSION

This court finds no implication of tribal sovereign immunity such that Clarke, a tribal employee sued in his individual capacity, is immune from suit. Therefore, Clarke's motion to dismiss is denied.

s/ LELAND J. COLE-CHU
Cole-Chu, J.

RECORD AND BRIEF

No. 15-1500

Supreme Court, U.S.
FILED
JUL 13 2016
OFFICE OF THE CLERK

In The

Supreme Court of the United States

BRIAN LEWIS AND MICHELLE LEWIS,

Petitioners,

v.

WILLIAM CLARKE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Connecticut

BRIEF IN OPPOSITION

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QUESTION PRESENTED

May a plaintiff abrogate tribal sovereign immunity by suing a tribal entity and its employee, but then withdrawing his suit against the entity and proceeding solely against the employee in his "individual" capacity for tortious conduct that occurred while the employee was acting in the scope of his employment?

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BRIEF IN OPPOSITION

This Court "sparingly exercise[s]" its power to grant certiorari; *Camreta v. Greene*, 563 U.S. 692, 709 (2011); and there is no reason to use it in this case. The Petitioners' purported conflict is shallow, poorly-developed and one-sided; the decision below is consistent with the limits on the immunity of government officials; and this Court reaffirmed the breadth of tribal sovereign immunity a few Terms ago in *Michigan v. Bay Mills Indian Community*, ___ U.S. ___, 134 S.Ct. 2024 (2014).

First, there is no cert-worthy conflict among lower courts on this issue. In truth, only the Ninth Circuit has applied the "remedy-sought" approach. See *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013). The Tenth Circuit avoided "wad[ing] into th[e] swamp" of determining the "real party in interest" in the very case that the Petitioners cite. *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296-97 (10th Cir. 2008) (dismissing suit because "plaintiffs have failed to state a claim against the Individual Defendants in their individual capacities"). Moreover, unresolved tension *within* both Circuits belies the notion that this Court should intervene. See *Murgia v. Reed*, 338 Fed. Appx. 614 (9th Cir. 2009) (unpublished) (rejecting, as a matter of law, individual capacity suit against tribal police officers); *Burrell v. Armijo*, 603 F.3d 825 (10th Cir. 2010) (rejecting, as a matter of law, individual capacity suit against tribal official).

Indeed, only a handful of courts even have decided whether a tribal official or employee may be sued as an "individual" for tortious acts within the scope of his authority. Every court besides the Ninth Circuit has rejected attempts to plead around tribal immunity by doing exactly what the Petitioners did: slapping on an "individual capacity" label.[1] See, e.g., *Chayoon v. Chao*, 355 F.3d 141 (2d Cir.), *cert. denied sub nom.*, *Chayoon v. Reels*, 543 U.S. 966 (2004). As such, there is no "longstanding division in authority among the Courts of Appeals[,]" *DePierre v. United States*, 564 U.S. 70, 78 (2011), to resolve.

Second, the decision below does not conflict with this Court's sovereign immunity jurisprudence. The principal vehicle for individual capacity suits for money damages against government officials is 42 U.S.C. § 1983, which abrogates the immunity of any "person" who violates the rights of another under color of law. This distinction and the unique nature of the other exception to immunity on which the Petitioners lean – a *Bivens* action – make them both poor bedfellows for the decision below.

In addition, like all nations "that exercise inherent sovereign authority[,]" *Bay Mills*, 134 S.Ct. at 2030, the Mohegan tribal courts are a central feature of the Tribe's sovereignty. The Tribe has waived its immunity

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[1] Louisiana's intermediate appellate court is the only tribunal outside of the Ninth Circuit to apply the "remedy-sought" approach. See *Zaunbrecher v. Succession of David*, 181 So. 3d 885 (La. App. 2015), *writ denied sub nom.*, *Zaunbrecher v. David*, 187 So. 3d 1002 (La. 2016); Supreme Court Rule 10(b).

and that of its employees to tort suits in its courts. See Mohegan Tribe, Code of Laws § 3-21, et seq. The Petitioners had an "alternative way to obtain relief for off-reservation commercial conduct[,]" *Bay Mills*, 134 S.Ct. at 2036 n. 8, but they chose not to avail themselves of it. As with any sovereign – be it the Tribe, the United States or the state of Connecticut – this waiver exists at its sufferance. However, had the Petitioners tried to sue a federal or state employee for conduct in the scope of his employment, they would not have made it to first base. See 28 U.S.C. §§ 2679 & 2680; Conn. Gen. Stat. § 4-165.

This Court considered and rejected many of the Petitioners' policy arguments two years ago in *Bay Mills*. Indian tribes are immune, even for "suits arising from [their] commercial activities, [which] take place off Indian lands[,]" *Bay Mills*, 134 S.Ct. at 2031, and only Congress may abrogate that immunity. *Id.*; *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 758 (1998). In keeping with those principles, this Court should decline the Petitioners' invitation to follow the Ninth Circuit's uncertain and lonely lead and tread where Congress has not: the "remedy-sought" swamp, in which creative pleading trumps common sense.

STATEMENT OF THE CASE

On October 22, 2011, the Petitioners were in a car traveling south on Interstate 95 in Norwalk, Connecticut. Pet. App., 2a. The Respondent, an employee of the Mohegan Tribal Gaming Authority (MTGA), was driving a limousine that was behind the Petitioners' car. *Id.* The MTGA, which is a constitutional entity with governmental and proprietary powers; see Mohegan Const., Art. XIII, sec. 1; owned and had insurance for the limousine.[2] Pet. App., 2a-3a. The Respondent "was driving patrons of the Mohegan Sun Casino to their homes[,]" *id.* at 2a, when the limousine struck the rear of the Petitioners' car; the crash injured both Petitioners.[3] *Id.*

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[2] The MTGA oversees all gaming activity for the benefit of the Tribe; see Mohegan Const., Art. XIII; and the MTGA's profits are a mainstay of the Tribe's exercise of sovereignty: Both the Indian Gaming Regulatory Act and the Mohegan Tribal Code require the Tribe to use gaming revenues for the welfare of its members and the furtherance of its governmental activities. See 25 U.S.C. § 2710(b)(2)(B); Mohegan Tribe, Code of Laws § 2-21. The Code requires the Tribe to use the net revenues from Mohegan Sun "to strengthen its Tribal government[,]" and "to provide for the general welfare of its members. The Tribe shall ensure that these areas receive the necessary financial support from net gaming revenue prior to distributing such revenue for other purposes." Mohegan Tribe, Code of Laws § 2-181.

[3] The Petitioners assert that Mohegan Sun "is approximately 70 miles from Norwalk." Pet., 4. There is no evidence of this fact in the record, and this Court does not usually "adjudicate either legal or predicate factual questions in the first instance[,]" *CRST Van Expedited, Inc. v. E.E.O.C.*, ___ U.S. ___, 136 S.Ct. 1642, 1654 (2016), because it "is a court of final review and not first view[.]" *Id.* at 1654. More importantly, distance is a red herring: This

The Petitioners initially sued both the MTGA and the Respondent. *Id.* at 3a, 18a. Two days later, the Petitioners withdrew their claims against the MTGA and proceeded solely against the Respondent. *Id.* at 18a. The Petitioners then filed a two-count amended complaint against the Respondent as an individual. Pet. App., 18a-19a. The sole allegation of individual capacity was the word "individually," which the Petitioners affixed to the headings of the two counts. Opp. App., 1, 3.

The Respondent moved to dismiss the complaint based on tribal sovereign immunity. Pet. App., 3a, 19a. In opposition to the motion, the Petitioners relied solely on the "remedy-sought" approach announced in *Maxwell*, *supra*: They did not dispute that the Respondent was a tribal employee acting in the scope of his employment, or that the accident happened while he was working for the MTGA. *Id.* at 10a, 20a-22a. To the contrary, the Petitioners "themselves alleged that 'at all relevant times herein, [the Respondent] was acting in the scope of his employment with the [MTGA] and was driving said vehicle with the permission of the [MTGA] as its employee, agent or servant.'" *Id.* at 10a.[4]

The Connecticut Superior Court sided with the Petitioners and denied the motion to dismiss because "[u]nder the facts of this case . . . the 'remedy-sought'

Court twice has refused "to confine tribal immunity to suits involving conduct on reservations or to noncommercial activities." *Bay Mills*, 134 S.Ct. at 2031; see *Kiowa*, 523 U.S. at 758.

[4] The Petitioners also conceded that neither the MTGA, nor the Respondent, had waived immunity. Pet. App., 25a.

analysis should be applied and, because the remedy sought is not against the MTGA, [the Respondent] is not immune from suit." *Id.* at 25a. The Superior Court correctly started with the premise that, as a tribal entity, the MTGA enjoys the same immunity as the Mohegan Tribe itself, and "rejected the notion that it had the power to abrogate sovereign immunity." *Id.* However, relying on *Maxwell*, the Superior Court concluded that because the Petitioners sought damages "from [the Respondent] personally . . . [t]he essential nature and effect of the relief sought can mean that the sovereign is not the real, substantial party in interest." *Id.* at 27a. The Superior Court brushed aside the MTGA's statutory duty to indemnify the Respondent; see Mohegan Tribe, Code of Laws §§ 4-52 & 4-53; and the similar obligation under the MTGA's insurance policy, as mere "voluntary undertaking[s]". Pet. App., 34a-35a. As such, the Court found "no implication of tribal sovereign immunity such that [the Respondent], a tribal employee sued in his individual capacity, is immune from suit." *Id.* at 36a.

The Connecticut Supreme Court unanimously reversed and directed the entry of judgment for the Respondent. The Court began where *Bay Mills* begins: Immunity from suit is a "core aspect[] of sovereignty[,]" and "a necessary corollary to Indian sovereignty and self-governance." Pet. App., 8a (quoting *Bay Mills*, 134 S.Ct. at 2030). As such, Congress must "unequivocally express" its intent to abrogate tribal immunity; this high bar "reflects an enduring principle of Indian law: Although Congress has plenary authority

over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." Pet App., 9a (quoting *Bay Mills*, 134 S.Ct. at 2031-32).

Mindful of this caution and deference, the Connecticut Supreme Court followed the widely-accepted rule that "tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority." Pet. App., 10a. As has nearly every other court to consider the issue, the Court refused to allow the Petitioners' choice to label their suit as an "individual capacity" claim "to affect tribal immunity [as that] would eviscerate its protections and ultimately subject tribes to damages actions for every violation of state or federal law." *Id.* at 12a-13a (quoting *Bassett v. Mashantucket Pequot Museum & Research Ctr., Inc.*, 221 F.Supp.2d 271, 280 (D. Conn. 2002)). Instead, the Court employed "the sounder approach . . . to examine the actions of the individual tribal defendants[,]" Pet. App., 13a, about which the Petitioners had left nothing to assume: Their complaint alleged, and the "undisputed facts establish[ed,] that the [Respondent] was acting within the scope of his employment when the accident that injured the [Petitioners] occurred." *Id.* at 10a. Finally, the Court "reject[ed] the [Petitioners'] invitation to apply *Maxwell*[,]" *id.* at 14a, because *Maxwell* involved allegations of gross negligence, which "are often deemed to be outside the scope of employment and, therefore, not subject to sovereign immunity." *Id.*

REASONS FOR DENYING THE PETITION

I. The shallow, poorly-developed and overwhelmingly one-sided conflict among lower courts does not merit certiorari.

This Court does not grant certiorari unless "there is a *real and embarrassing* conflict of opinion and authority between the Circuit Courts of Appeals." *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955) (emphasis added). The "conflict" in this instance hardly merits the use of the word: It pits the Ninth Circuit against every state supreme court and federal appellate court (and every intermediate appellate court except one, see *supra*, n. 1) actually to decide the "remedy-sought" issue – and the law is not clear even in the Ninth Circuit. Furthermore, despite the "486 tribal gaming operations in 28 states[,]" Pet., 24, only a dozen or so decisions actually address the issue. This shallow, poorly-developed and overwhelmingly one-sided conflict is not worthy of review. See Supreme Court Rule 10; John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982) ("judicial restraint teaches us that patience in the resolution of conflicts may sometimes produce the most desirable result").

A. A plaintiff may not plead around tribal immunity by affixing an "individual capacity" label to a suit over a tribal employee's tortious conduct that occurred while he was acting in the scope of his employment.

It is well-settled that "tribal sovereign immunity has been extended to tribal officers acting in their representative capacities and within the scope of their authority." *Wright v. Prairie Chicken*, 579 N.W.2d 7, 9 (S.D. 1998); see *Inquiry Concerning Complaint of Judicial Standards Comm'n v. Not Afraid*, 245 P.3d 1116, 1120 (Mont. 2010); *Wright v. Colville Tribal Enter. Corp.*, 147 P.3d 1275, 1280 (Wash. 2006), *cert. dismissed*, 550 U.S. 931 (2007). This is true, too, for "employees of the [t]ribe when the complaint concerns actions taken in defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority." *Chayoon*, 355 F.3d at 143; accord *M.J. ex rel. Beebe v. United States*, 721 F.3d 1079, 1084 (9th Cir. 2013).

The label that a plaintiff chooses to attach to a tribal employee does not determine whether the employee is immune from suit. "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Courts "[l]ook[] through forms of words to the substance of the complaint," *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 477 (1982), because "distinguishing between . . .

claims based on the particular label affixed to them would elevate form over substance and allow parties to evade [tribal immunity] simply by relabeling their . . . claims[.]" *Aetna Health Inc. v. Davila*, 542 U.S. 200, 214 (2004);[5] see *Cahill v. New York, N. H. & H. R. Co.*, 351 U.S. 183, 188 (1956) (Black, J., dissenting) ("[t]he substance of the pleadings and not their labels should govern our action").

The determinative factor is whether the employee acted in the scope of his employment; otherwise, litigants could "circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants' official or representative capacities[.]" *Chayoon*, 355 F.3d at 143; see *Gooding v. Ketcher*, 838 F.Supp.2d 1231, 1246 (N.D. Okla. 2012) ("claimants may not simply describe their claims against a tribal official as in his 'individual capacity' in order to eliminate tribal immunity"); *Young v. Duenas*, 262 P.3d 527, 531 (Wash. App. 2011), *rev. denied*, 272 P.3d 851 (Wash. 2012), *cert. denied sub nom.*, *Young v. Fitzpatrick*, ___ U.S. ___, 133 S.Ct. 2848 (2013) (ellipses in original) (affirming dismissal as nothing "suggests [tribal officers] acted in their individual capacity[,]" so "[p]laintiffs . . . cannot circumvent tribal immunity through a mere pleading device").

Chayoon is a prime example of the wisdom of that rule. Mr. Chayoon attempted the same end-run around

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[5] *Aetna* involved relabeling claims in order to avoid ERISA preemption, but the principle is the same.

tribal immunity as the Petitioners, albeit by a longer road: He first sued the Mashantucket Pequot Tribal Nation and Foxwoods Casino in federal court for claimed violations of Connecticut's Family Medical Leave Act, but the court dismissed his suit based on tribal immunity. See *Chayoon v. Sherlock*, 877 A.2d 4 (Conn. App.), *cert. denied*, 888 A.2d 83 (Conn. 2005), *cert. denied*, 547 U.S. 1138 (2006) (describing history of litigation); see Docket Sheet in 3:02-cv-0163 (AVC), available at https://ecf.ctd.uscourts.gov/cgi-bin/DktRpt.pl?631370492747471-L_1_0-1 (web-site last visited 8/17/15).

Chayoon then sued seventeen individual defendants and the "Foxwoods Management Team" in federal court for the same claimed violations. 877 A.2d at 6; see Docket Sheet in 3:02-cv-1358 (AVC), available at https://ecf.ctd.uscourts.gov/cgi-bin/DktRpt.pl?118541761201346-L_1_0-1 (website last visited 8/17/15). In his second suit, Chayoon did exactly what the Petitioners did: He named the defendants as individuals, even though all seventeen held "positions on the Mashantucket Pequot Tribal Council or are officers and/or employees of Mashantucket Pequot Gaming Enterprise," and his "complaint concerns actions taken in defendants' official or representative capacities and . . . does not allege they acted outside the scope of their authority." 355 F.3d at 143. The Second Circuit rejected Chayoon's attempt to circumvent tribal immunity. *Id.*

Finally, Chayoon tried his luck in state court – and his pleading strategy again mirrored the Petitioners': Chayoon named "eight individuals who are or formerly

were employed by the Mashantucket Pequot Gaming Enterprise at Foxwoods" as defendants, 877 A.2d at 6 n. 1, and alleged "that the individual defendants are being sued in their 'personal' capacities as well as in their 'professional' capacities . . . [and] that because the defendants violated the FMLA, they necessarily acted beyond the scope of their authority and in their individual capacities." *Id.* at 9. The Connecticut Appellate Court rejected Chayoon's "argu[ment] that the defendants are not immune from suit because they . . . were being sued individually," *id.* at 7, and pointed out that his complaint

> patently demonstrates that in terminating the plaintiff's employment, *the defendants were acting as employees of Foxwoods within the scope of their authority*. It is insufficient for the plaintiff merely to allege that the defendants violated federal law or tribal policy in order to state a claim that they acted beyond the scope of their authority. . . . Such an interpretation *would eliminate tribal immunity from damages actions* because *a plaintiff must always allege a wrong* or a violation of law in order to state a claim for relief. In order to circumvent tribal immunity, the plaintiff must have alleged and proven, apart from whether the defendants acted in violation of federal law, that the defendants acted without any colorable claim of authority. . . . The plaintiff has made no proffer of such conduct here. The plaintiff merely has alleged that *he sued the defendants in their personal*

> *capacities* and that they acted outside of their authority.

Id. at 9-10 (emphasis added; internal citations and quotation marks omitted).

Other decisions echo the *Chayoon* cases' abhorrence for misleading labels. See *Gooding*, 838 F.Supp.2d at 1246; *Young*, 262 P.3d at 531; *Bassett*, 221 F.Supp.2d at 280 (plaintiffs "may not simply describe their claims against a tribal official as in his 'individual capacity' in order to eliminate tribal immunity"); *Wright*, 579 N.W.2d at 9 ("[t]he defense of sovereign immunity may not be evaded simply by suing officers in their individual capacity"). Still others simply reject individual capacity claims with little discussion. See *Oberloh v. Johnson*, 768 N.W.2d 373, 376-77 (Minn. App. 2009) (reversing denial of tribal treasurer's motion for summary judgment because he "was acting within the scope of his authority" when he mailed allegedly defamatory tribal newsletters); *Koke v. Little Shell Tribe of Chippewa Indians of Montana, Inc.*, 68 P.3d 814, 817 (Mont. 2003) (rejecting claim that "tribal officials . . . acting in their official capacities" were "liable for [those] actions in their individual capacities").

The Petitioners' amended complaint epitomizes the elevation of form over substance: The sum of their allegations that the Respondent acted in an individual capacity is a single word: "individually," which they added to the headings of the two counts after they withdrew as to the MTGA. Opp. App., 1, 3. Like *Chayoon* and its compatriots, the Connecticut Supreme Court's

unanimous decision refuses to allow the Petitioners to escape the consequences "when the[ir] complaint concerns actions taken within the scope of [a tribal employee's] duties and the complaint does not allege, nor have the [Petitioners] offered any other evidence, that he acted outside of the scope of his authority." Pet. App., 16a-17a. This outcome fairly holds the Petitioners to the substance of their own allegations.

B. The Tenth Circuit has not actually held that a tribal employee may be sued in his individual capacity for tortious conduct that occurred while he was acting in the scope of his employment.

In an attempt to generate smoke where there is no fire, the Petitioners contend that "[t]he Ninth and Tenth Circuits have held that tribal sovereign immunity does not apply to individual-capacity damages actions." Pet., 7. This misstates the law in the Tenth Circuit, which is, at best, a mixed bag.

As the Petitioners fleetingly acknowledge, Pet., 11, the Tenth Circuit reversed the denial of a tribal official's motion for judgment as a matter of law – two years *after Native Am. Distrib.*, *supra* – because there was no evidence that he had acted outside the scope of his authority. *Burrell*, *supra*, 603 F.3d 825. *Burrell* explains that while "immunity does not extend to an official when the official is acting as an individual or outside the scope of those powers that have been delegated to him . . . [t]he immunity question hinges on the

breadth of the official power the official enjoys and not whether the official is charged with using that power tortuously or wrongfully." *Id.* at 832. In other words, absent evidence that a tribal official or employee has acted outside the scope of authority given to him by the tribe, he cannot have acted as an individual. *Id.* at 832-36.

Burrell cites *Native Am. Distrib.* once (for the black-letter principle that "federally-recognized Indian tribes possess immunity from suit[,]" *id.* at 832), but does not discuss or distinguish it. Given that the two cases look in opposite directions, this Court should allow the Tenth Circuit to clean its own house rather than wielding the broom itself.[6]

Moreover, the *Native Am. Distrib.* decision consciously sidesteps the very holding that the Petitioners attribute to it. In that case, a tobacco distributor sued the Seneca-Cayuga Tribe, the Seneca-Cayuga Tobacco Company, and three of the Company's officers for breach of contract and civil conspiracy. 546 F.3d at

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[6] The Petitioners claim that "more recently [than *Burrell*] the Tenth Circuit has continued to apply the rule set out in *Native American Distributing*, see *Sanders v. Anoatubby*, 631 Fed. Appx. 618, 622 n. 9 (10th Cir. 2015) [(unpublished)]." Pet., 10. *Sanders* does nothing of the sort. Though *Sanders* mentions the "remedy-sought" discussion in *Native Am. Distrib.*, like its purported progenitor, it *affirms* the dismissal of a suit against tribal officials based on tribal immunity. 631 Fed. Appx. at 622-23. Indeed, the plaintiff in *Sanders* "d[id] not dispute that the Division and the tribal officer defendants are entitled to tribal sovereign immunity[,]" *id.* at 621-22, because she did not "quarrel with the [District Court's] expressed conclusion that this is an official capacity suit." *Id.* at 622 n. 9.

1290-91. The District Court dismissed the suit based on tribal immunity. *Id.* at 1291-92.

The Tenth Circuit affirmed. *Id.* at 1290. It disagreed with the District Court that the officers were entitled to immunity merely "[b]ecause all the allegations in the complaint related to actions that [they] took in their official capacities," *id.* at 1296, but did not *hold* "that tribal sovereign immunity . . . does not apply to individual-capacity damages actions." Pet., 9. The Tenth Circuit noted "that tribal officials are immunized from suits brought against them *because of* their official capacities[,]" 546 F.3d at 1296 (emphasis in original), and analogized tribal immunity to "sovereign immunity, [which] does not bar the suit so long as the relief is sought not from the sovereign's treasury but from the officer personally." *Id.* at 1297 (quoting *Alden v. Maine*, 527 U.S. 706, 757 (1999)).

However, this discussion – in essence, the "remedy-sought" approach – was *dicta*; the Tenth Circuit's actual holding follows it:

> We need not wade into this swamp, however, because a close reading of the plaintiffs' complaint makes clear that *plaintiffs have failed to state a claim against the [officers] in their individual capacities*. As a result, the claims asserted against the [officers] are subject to dismissal under Rule 12(b)(6), Fed.R.Civ.P. We therefore affirm the district court's dismissal

> of the claims against the [officers], albeit on different grounds.

546 F.3d at 1297 (emphasis added).[7]

It is axiomatic that "[t]his Court, like all federal appellate courts, does not review lower courts' opinions, but their judgments." *Jennings v. Stephens*, ___ U.S. ___, 135 S.Ct. 793, 799 (2015). In the certiorari context, "a federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues." *Rice*, 349 U.S. at 74. The actual holding of *Native Am. Distrib.* does not pose the conflict that the Petitioners posit; see *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 352 n. 12 (2005) ("[d]ictum settles nothing, even in the court that utters it"); and this Court's "function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial." *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) (dismissing certiorari as improvidently granted).

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[7] The Petitioners also cite *Fletcher v. United States*, 116 F.3d 1315 (10th Cir. 1997), which involved only claims for declaratory and injunctive relief. Pet., 10. *Fletcher* holds that tribal immunity barred the plaintiffs' official-capacity claims; *id.* at 1318, 1324-25; and also rejects the plaintiffs' individual-capacity claims because the "Indian Civil Rights Act speaks only to tribal action . . . and does not authorize a cause of action for declaratory or injunctive relief against either the Osage Tribe or its officers in federal court." *Id.* at 1324 n. 12.

C. The Ninth Circuit has reached contradictory results in tort suits against tribal officers and employees in their individual capacity.

The Ninth Circuit itself is Jekyll-and-Hyde on whether a plaintiff may sue tribal officials or employees as individuals for acts within the scope of their authority. As a consequence, the purported conflict does not "justify the exercise of our discretionary certiorari jurisdiction[.]" *Office of Senator Mark Dayton v. Hanson*, 550 U.S. 511, 515 (2007) (dismissing appeal and denying certiorari because decision of D.C. Circuit "is no longer in obvious conflict with any other Circuit").

The Ninth Circuit embraced the "remedy-sought" approach in *Maxwell*, *supra*, in which a shooting victim's family sued tribal paramedics for their "allegedly grossly negligent" treatment of the victim. 708 F.3d at 1080-81, 1090. The paramedics moved for summary judgment based on tribal immunity. *Id.* at 1081. The Ninth Circuit examined "whether the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the sovereign from acting, or to compel it to act." *Id.* at 1088. The Ninth Circuit upheld the denial of the paramedics' motion because the family had "sued [them] in their individual capacities for money damages. Any damages will come from their own pockets, not the tribal treasury." *Id.* at 1089.

The Ninth Circuit maneuvered around a pair of its own decisions to reach this result. See *id.* at 1088-89 (distinguishing *Cook v. Avi Casino Enterprises, Inc.*, 548 F.3d 718 (9th Cir. 2008), *cert. denied*, 556 U.S. 1221 (2009), and *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985)). Though *Maxwell* takes the view that these cases "do not question the general rule that individual officers are liable when sued in their individual capacities[,]" 708 F.3d at 1089, its analysis of *Hardin* does not hold water.[8]

In *Hardin*, the plaintiff sued "the [White Mountain Apache] Tribe, Tribal Court, Tribal Council, and various officials in their individual capacities, seeking declaratory and injunctive relief and damages on both constitutional and statutory grounds." 779 F.2d at 478. The opinion says nothing else about the capacity in which those officials were sued; it simply affirms the dismissal of the plaintiff's suit based on tribal immunity "[b]ecause all the individual defendants here were acting within the scope of their delegated authority." *Id.* at 479-80.

Maxwell acknowledges that "*Hardin* did not mention the remedy-sought principle . . . but it did not need to do so. *Hardin* was *in reality* an official capacity suit."

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[8] The Ninth Circuit recently employed the "remedy-sought" approach a second time. See *Pistor v. Garcia*, 791 F.3d 1104, 1115 (9th Cir. 2015) (tribal defendants not immune "because they are being sued in their individual capacities, rather than in their official capacities," and plaintiffs "seek[ ] money damages not from the tribal treasury but from the tribal defendants personally").

708 F.3d at 1089 (emphasis added). To prove this "reality," *Maxwell* betrays its own "remedy-sought" rule: It notes that *Hardin* does not

> (1) identify which officials were sued in their individual capacities or (2) the exact nature of the claims against them. But the use of the word "officials" suggests the plaintiff had sued high-ranking tribal council members for voting to eject him. *Holding the defendants liable for their legislative functions would therefore have attacked the very core of tribal sovereignty.*

Id. (emphasis added; quotation marks omitted). The highlighted sentence – while true – has nothing to do with the capacity in which the plaintiff sued those officials. Per *Maxwell*, the plaintiff chose that by the relief that he sought.[9] Indeed, that the plaintiff sought money damages from individual tribal officials for acts at "the very core of tribal sovereignty" emphasizes the foolishness of allowing a trick of pleading to trump the truth. *Hardin* recognized this danger, no matter the subsequent spin put on it by *Maxwell*.

Moreover, *Maxwell* overlooks *Murgia*, *supra*, which directly contradicts it. In *Murgia*, the plaintiff sued

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[9] Though *Maxwell* makes much of the purported failure to "identify which officials were sued in their individual capacities[,]" 708 F.3d at 1089, that is a red herring: *Hardin* states that the plaintiff sued "various officials in their individual capacities". 779 F.2d at 478. The obvious reading of that phrase is that the plaintiff sued *all* of the officials as individuals; if he had sued some officials as individuals and others not, the opinion likely would have distinguished between them.

two tribal police officers over the shooting death of another tribal member. 338 Fed. Appx. at 615. The officers were responding to a domestic disturbance at a home on tribal lands at the time of the shooting. *Id.* The District Court nonetheless "held that the Defendants were not entitled to sovereign immunity because the complaint named them in their individual capacities." *Id.* The Ninth Circuit curtly rejected the conclusion

> that tribal sovereign immunity did not apply solely because the Defendants were sued in their individual capacities. In our circuit, the fact that a tribal officer is sued in his individual capacity does not, without more, establish that he lacks the protection of tribal sovereign immunity. . . . If the Defendants were acting for the tribe within the scope of their authority, *they are immune from Plaintiff's suit regardless of whether the words "individual capacity" appear on the complaint.*

Id. at 616 (emphasis added; citation omitted).[10]

In addition, the Petitioners pooh-pooh the allegations of gross negligence in *Maxwell* as not "having anything to do with whether sovereign immunity applies to [tribal employees]." Pet., 13. An allegation of gross negligence is not an absolute bar to finding that an employee acted within the scope of his employment,

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[10] The Ninth Circuit remanded the case for further proceedings on whether the officers (1) were, in fact, acting within the scope of their authority, and (2) were acting as federal agents, not tribal agents, at the time. 338 Fed. Appx. at 616.

but, as the Petitioners' own authority notes, "[t]he employee's state of mind *will often be relevant to deciding whether he was acting within the scope of his employment* or had embarked on a frolic of his own; whether, for example, if he was a bill collector, he had struck the debtor in an effort to collect the debt owed his employer or had struck him out of personal malice." *Scottsdale Ins. Co. v. Subscription Plus, Inc.*, 299 F.3d 618, 621-22 (7th Cir. 2002) (emphasis added).

The plaintiffs in *Maxwell* sued under California law, 708 F.3d at 1081, which defines "[g]ross negligence . . . as either a 'want of even scant care' or 'an extreme departure from the ordinary standard of conduct.'" *City of Santa Barbara v. Superior Court*, 161 P.3d 1095, 1099 (Cal. 2007). This is a far cry from the Petitioners' own allegations, which describe adherence to a limousine driver's ordinary behavior on the job, not "an extreme departure" from it. In any event, the lack of clarity within the Ninth Circuit – which it could resolve in a future case via *en banc* consideration – obviates any need for this Court to intervene.[11]

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[11] The panel in *Maxwell* denied a petition for rehearing/rehearing *en banc*. 708 F.3d at 1079. No petition was filed in *Pistor*. See 791 F.3d at 1104.

II. There is no conflict between the decision of the Connecticut Supreme Court and limitations on the sovereign immunity of government officials.[12]

The Petitioners contend that "[s]overeign immunity bars suits seeking relief from the sovereign, not suits seeking relief only from the sovereign's employees." Pet., 14. However, a clear-eyed reading of this Court's precedents belies the Petitioners' claim that the Connecticut Supreme Court has "created a form of tribal immunity that is far broader than the comparable immunities applicable to States and the federal government." *Id.*

As the Petitioners admit, individual capacity suits for money damages are "most commonly brought under 42 U.S.C. [§] 1983[.]" Pet., 17. Such suits do not run afoul of sovereign immunity because of § 1983's use of the word "person". See *Hafer v. Melo*, 502 U.S. 21, 26 (1992). Section 1983 abrogates sovereign immunity, pursuant to Congress' authority under the Fourteenth Amendment, "to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position. . . . Accordingly, it authorized suits to redress deprivations of civil rights by

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[12] Much of this section of the Petition addresses a non-issue: suits for declaratory or injunctive relief. Pet., 15-18. The decision below has no effect on the amenability of tribal officials and employees to such suits; they stand in the same shoes as their federal and state brethren. See *Bay Mills*, 134 S.Ct. at 2035 (emphasis in original) ("tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct").

persons acting under color of any state statute, ordinance, regulation, custom, or usage." *Id.* at 27; see *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 934 (1982) (brackets and quotation marks omitted) (Civil Rights Act "was passed for the express purpose of enforcing the [p]rovisions of the Fourteenth Amendment").

This waiver of immunity for individual capacity damages suits depends on the specific use of "person" in § 1983. As *Hafer* points out, "officers sued in their personal capacity come to court as individuals. A government official in the role of personal-capacity defendant thus fits comfortably within the statutory term 'person.'" 502 U.S. at 27. In short, government officials sued in their individual capacity are "persons" under § 1983 and cannot claim immunity. *Id.* at 28-29.

No statutory safe harbor exists in this case. The Petitioners brought an ordinary negligence action – not a claim that an official deprived them of their constitutional rights under the color of law – and Congress has not waived tribal immunity for such actions. Absent a statutory waiver of immunity, the result for a federal or state employee would be the same as for the Respondent: dismissal. See *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813-14 (1984); *Columbia Air Servs., Inc. v. Dep't of Transp.*, 977 A.2d 636, 642-43 (Conn. 2009) (exceptions to immunity of state officials and employees "are few and narrowly construed").

If the Respondent had been a federal or state employee, the Petitioners' own allegations would have

barred their suit. See 28 U.S.C. §§ 2679 & 2680; Conn. Gen. Stat. § 4-165. Once the Attorney General certifies that a federal employee was acting in the scope of his employment, immunity automatically attaches, the United States is substituted as a party, and the employee may not "again be pursued in any damages action arising from the same subject matter." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 422 (1995). State employees enjoy the same protection, but reach it by a slightly longer road. See *Martin v. Brady*, 802 A.2d 814, 817 (Conn. 2002) (question under § 4-165 "is whether the facts as alleged in the pleadings, viewed in the light most favorable to the plaintiff, are sufficient to survive a motion to dismiss on the ground of statutory immunity").

The Petitioners' only other example – a *Bivens* action – hardly strengthens their position. A *Bivens* action requires a constitutional violation by a government official, not merely negligent conduct within the scope of his job. See *Minneci v. Pollard*, ___ U.S. ___, 132 S.Ct. 617, 621 (2012). Moreover, this Court has been hostile to expanding the scope of permissible *Bivens* actions. See *id.* at 621-23 (enumerating claims that do not give rise to a *Bivens* action).

The Petitioners' last resort is a naked appeal to sympathy; they assert that "[t]he decision below will leave many plaintiffs who are injured by tribal employees without a remedy." Pet., 22. This point might carry more weight were the next paragraph not a discussion of the remedy *available* to plaintiffs injured by MTGA employees. *Id.* Tribal immunity does not deny relief to

people like the Petitioners; it merely requires them to seek it in a different forum: The Mohegan Gaming Disputes Court. See Mohegan Tribe, Code of Laws § 3-21 (establishing Gaming Disputes Court); *Kizis v. Morse Diesel Int'l, Inc.*, 794 A.2d 498, 505 (Conn. 2002) ("[t]he Mohegan Torts Code together with the gaming compact and the Mohegan constitution provide a forum and mechanism to redress the plaintiff's injuries").

The Tribe has adopted Connecticut's General Statutes and common law, to the extent that they do not conflict with tribal law, and the Gaming Disputes Court regularly adjudicates tort suits against the MTGA and its employees. Mohegan Tribe, Code of Laws § 3-52(a)(2). Though the Petitioners complain that "such a proceeding carries no right to a jury trial" or to recover punitive damages, this puts them in the *same* position, for instance, as persons who sue under the Federal Tort Claims Act. See 28 U.S.C. § 2402 ("any action against the United States under section 1346 shall be tried by the court without a jury"); 28 U.S.C. § 2674 (United States "shall not be liable for interest prior to judgment or for punitive damages").

Instead of suing in the Gaming Disputes Court, the Petitioners brought an action against the MTGA and the Respondent in state court and then withdrew almost immediately as to the MTGA. Pet. App., 18a. This sort of creative pleading is an improper end-run around tribal immunity. See *Chayoon*, 355 F.3d at 143; *Gooding*, 838 F.Supp.2d at 1246. If sanctioned, it will result in a stampede away from the Mohegan tribal courts. A functioning court system is a critical aspect

of sovereignty; reducing the efficacy of the Mohegan court system undermines the Tribe's sovereignty.

Finally, the Petitioners make much of the fact that the Gaming Disputes Court "exists only at the grace of the Tribe". Pet., 22. However, that is true for *every* waiver of sovereign immunity no matter the sovereign. The ability to sue under the Federal Tort Claims Act depends on the "grace" of Congress; Connecticut's legislature could eliminate the motor vehicle exception to sovereign immunity, Conn. Gen. Stat. § 52-556, at the drop of a hat. The dependent nature of a waiver of tribal immunity does not prove a conflict with this Court's jurisprudence; it emphasizes their consistency.

CONCLUSION

For the foregoing reasons, the Respondent respectfully asks this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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DOCKET NO.: KNL-CV13-6019099-S	SUPERIOR COURT
BRIAN LEWIS AND MICHELLE LEWIS	JD OF NEW LONDON
VS.	AT NEW LONDON
WILLIAM CLARKE	NOVEMBER 20, 2013

AMENDED COMPLAINT

COUNT ONE: (Brian Lewis vs. William Clarke, individually)

1. On or about October 22, 2011, at approximately 6:39 p.m., the plaintiff, Brian Lewis (hereinafter the "plaintiff" in this Count One), was the operator of a motor vehicle traveling southbound on Interstate 95 in Norwalk, Connecticut.

2. At the same time and place, the defendant, William Clarke, a resident of the State of Connecticut was operating a motor vehicle traveling behind the plaintiff, southbound on Interstate 95.

3. Suddenly and without warning, the defendant, William Clarke, drove the limousine into the rear end of the plaintiff's vehicle, the violent force of which caused that vehicle to propel forward, coming to rest partially on top of a jersey barrier located on the left hand side of the roadway (hereinafter the "collision").

4. Said collision and the injuries and damages as hereinafter set forth, were caused by the negligence and carelessness of William Clarke, in one or more the following ways, in that William Clarke:

a. violated Section 14-218 of the Connecticut General Statutes by operating a motor vehicle at an unreasonable rate of speed having regard for the time of day, intersection of street, width, traffic and use of such highway and the weather conditions;

b. violated Section 14-240 of the Connecticut General Statutes by operating said motor vehicle too close to the vehicle traveling in front of him;

c. failed to apply the brakes of the motor vehicle in a timely manner or otherwise maneuver a motor vehicle so as to avoid the collision with the vehicle in front of him;

d. failed to keep a motor vehicle under reasonable and proper control;

e. failed to keep an adequate and proper lookout ahead;

f. was inattentive to driving; and

g. failed under all the circumstances then and there existing to take reasonable and proper precautions to avoid the probability of harm to the plaintiff.

5. As a direct result of the collision, the plaintiff sustained the following injuries, some or all of which may be permanent in nature and will be the cause of future pain and disability, as well as fear of the same:

a. Loss of consciousness;

b. Lumbar sprain/strain;

c. Cervical sprain/strain; and

d. Post concussion syndrome

6. To treat said injuries, the plaintiff was required to seek emergency medical treatment, orthopedic treatment, follow-up treatment, physical therapy, radiological exams, and prescription pain killing medication.

7. As a result of said injuries the plaintiff has suffered and in the future will continue to suffer great physical and mental pain.

8. By reason of the negligence and carelessness of the defendant, as aforesaid, the plaintiff was required to spend substantial sums of money for the medical care, services, treatment, diagnostic studies, drugs and devices necessitated by said injuries.

9. As a result of said injuries the plaintiff has suffered and in the future will continue to suffer from a fear of future disability.

COUNT TWO: (Michelle Lewis vs. William Clarke, individually)

1. On or about October 22, 2011, at approximately 6:39 p.m., the plaintiff, Michelle Lewis (hereinafter the "plaintiff" in this Count Two), was the passenger of a motor vehicle traveling southbound on Interstate 95 in Norwalk, Connecticut.

2. At the same time and place, the defendant, William Clarke, a resident of the State of Connecticut

was operating a motor vehicle traveling behind the plaintiff, southbound on Interstate 95.

3. Suddenly and without warning, the defendant, William Clarke, drove the limousine into the rear end of the plaintiff's vehicle, the force of which caused that vehicle to propel forward, coming to rest partially on top of a jersey barrier located on the left hand side of the roadway (hereinafter the "collision").

4. Said collision and the injuries and damages as hereinafter set forth, were caused by the negligence and carelessness of William Clarke and the Mohegan Tribal Gaming Authority, in one or more the following ways, in that William Clarke:

a. violated Section 14-218 of the Connecticut General Statutes by operating a motor vehicle at an unreasonable rate of speed having regard for the time of day, intersection of street, width, traffic and use of such highway and the weather conditions;

b. violated Section 14-240 of the Connecticut General Statutes by operating said motor vehicle too close to the vehicle traveling in front of him;

c. failed to apply the brakes of the motor vehicle in a timely manner or otherwise maneuver a motor vehicle so as to avoid the collision with the vehicle in front of him;

d. failed to keep a motor vehicle under reasonable and proper control;

e. failed to keep an adequate and proper lookout ahead;

f. was inattentive to driving; and

g. failed under all the circumstances then and there existing to take reasonable and proper precautions to avoid the probability of harm to the plaintiff.

5. As a direct result of the collision, the plaintiff sustained the following injuries, some or all of which may be permanent in nature and will be the cause of future pain and disability, as well as fear of the same:

a. Nasal fracture;

b. Lumbar sprain/strain; and

c. Cervical sprain/strain.

6. To treat said injuries, the plaintiff was required to seek emergency medical treatment, orthopedic treatment, follow-up treatment, physical therapy, radiological exams, and prescription pain killing medication.

7. As a result of said injuries the plaintiff has suffered and in the future will continue to suffer great physical and mental pain.

8. By reason of the negligence and carelessness of the defendant, as aforesaid, the plaintiff was required to spend substantial sums of money for the medical care, services, treatment, diagnostic studies, drugs and devices necessitated by said injuries.

9. As a result of said injuries the plaintiff has suffered and in the future will continue to suffer from a fear of future disability.

WHEREFORE, the plaintiffs claim:

1. Monetary damages;

2. Such other relief as is within the jurisdiction of the Court.

THE PLAINTIFFS

BY /s/ James Harrington

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DOCKET NO.: KNL-CV13-6019099-S	SUPERIOR COURT
BRIAN LEWIS AND MICHELLE LEWIS	JD OF NEW LONDON
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WILLIAM CLARKE	NOVEMBER 20, 2013

STATEMENT OF AMOUNT IN DEMAND

The amount, legal interest, or property in demand is fifteen thousand dollars or more, exclusive of interest and costs.

THE PLAINTIFFS

BY /s/ James Harrington

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CERTIFICATION

I hereby certify that a copy of the foregoing was mailed on this 20TH day of November, 2013, to the following:

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/s/ James Harrington
James M. Harrington, Esq.

RECORD AND BRIEFS

No. 15-1500

In the Supreme Court of the United States

BRIAN LEWIS AND MICHELLE LEWIS, PETITIONERS

v.

WILLIAM CLARKE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

No. 15-1500

BRIAN LEWIS AND MICHELLE LEWIS, PETITIONERS

v.

WILLIAM CLARKE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

REPLY BRIEF FOR THE PETITIONERS

The Connecticut Supreme Court held that the sovereign immunity of an Indian tribe bars an action seeking damages from a tribal employee personally—not from the tribe itself—based on that employee's off-reservation negligent driving. While its conclusion accords with a decision of the Second Circuit and the Montana Supreme Court, it conflicts with decisions of the Ninth and Tenth Circuits, and it extends tribal sovereign immunity more broadly than the sovereign immunity of the federal government and the States. It warrants this Court's review and correction.

Respondent argues that the circuit conflict is poorly developed, but the Ninth and Tenth Circuits have

both articulated a view of tribal sovereign immunity that is irreconcilable with the decision below, and the Ninth Circuit has repeatedly applied that view in denying immunity claims like respondent's. Respondent also attempts to defend the merits of the decision below, but his argument is contrary to this Court's decisions explaining that sovereign immunity applies only when a plaintiff seeks relief that would operate against the sovereign, not when a plaintiff seeks damages from a government employee personally.

Respondent does not deny the importance of the question presented, which affects the potential tort liability of hundreds of thousands of tribal employees nationwide. Nor does respondent suggest that this case is an inadequate vehicle for considering it. Unlike in *Young* v. *Fitzpatrick*, 133 S. Ct. 2848 (2013), a case raising a similar question in which this Court called for the views of the Solicitor General but ultimately denied certiorari, the question presented here was preserved and considered by the court below. This Court should grant the petition to resolve this important legal issue.

A. The decision below contributes to a conflict in the lower courts

The Connecticut Supreme Court held that tribal sovereign immunity bars petitioners' negligence claims even though petitioners seek money damages from respondent individually, not from the Mohegan Tribe. That is so, the court said, because respondent "was an employee of the tribe and was acting within the scope of his employment when the accident occurred." Pet. App. 16a. In the court's view, tribal em-

ployees are subject to individual damages liability only when they act outside the scope of their official authority. *Id.* at 16a-17a. As explained in the petition (at 7-10), the Ninth and Tenth Circuits disagree. Respondent argues (Br. in Opp. 8) that the conflict is "poorly-developed," but that is incorrect.

1. The Ninth Circuit has held that "tribal defendants sued in their *individual* capacities for money damages are not entitled to sovereign immunity, even though they are sued for actions taken in the course of their official duties." *Pistor* v. *Garcia*, 791 F.3d 1104, 1112 (9th Cir. 2015). And it has cautioned that "[i]n any suit against tribal officers, we must be sensitive to whether 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act.'" *Maxwell* v. *County of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013) (quoting *Shermoen* v. *United States*, 982 F.2d 1312, 1320 (9th Cir. 1992), cert. denied, 509 U.S. 903 (1993)) (second brackets in original). If so, the suit is "in reality an official capacity suit"—that is, it is effectively one against the tribe—and sovereign immunity will apply. *Id.* at 1089. But individual-capacity suits against tribal officials do not seek relief from the tribe, and therefore they are not barred by tribal sovereign immunity. *Id.* at 1088; *Pistor*, 791 F.3d at 1112.

Respondent asserts (Br. in Opp. 18) that "[t]he Ninth Circuit has reached contradictory results in tort suits against tribal officers and employees in their individual capacity," but the cases he cites do not support that proposition. All three cases predate *Max-*

well, and the two published decisions—*Cook* v. *Avi Casino Enters., Inc.*, 548 F.3d 718 (9th Cir. 2008), cert. denied, 556 U.S. 1221 (2009), and *Hardin* v. *White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985)—were expressly addressed by the *Maxwell* court, which explained that they involved official-capacity rather than individual-capacity suits. *Maxwell*, 708 F.3d at 1088-1089. The third case, *Murgia* v. *Reed*, 338 Fed. Appx. 614 (9th Cir. 2009), is an unpublished decision that lacks precedential force.

Respondent cannot deny that the results in *Maxwell* and in *Pistor* are irreconcilable with the decision below: in both cases, the Ninth Circuit allowed individual-capacity damages actions to proceed against tribal employees for acts within the scope of their employment. Instead, like the court below, respondent emphasizes (Br. in Opp. 22) that *Maxwell* involved allegations of gross negligence, not ordinary negligence. As explained in the petition (at 12-14), however, neither *Maxwell* nor *Pistor* suggested that the defendants' level of negligence was relevant to sovereign immunity. A defendant's level of negligence might be relevant to whether he or she was acting within the scope of employment—although even that is doubtful, see Pet. 13—but in the Ninth Circuit, sovereign immunity depends only on the capacity in which a defendant is sued, not on the capacity in which he or she was acting at the time of the events giving rise to the litigation.

The complaint in this case seeks money damages from respondent personally, not from the Mohegan Tribe. Pet. App. 3a. For that reason, the Ninth Cir-

cuit would not have held that this action is barred by sovereign immunity.

2. Like the Ninth Circuit, the Tenth Circuit has recognized that the availability of tribal sovereign immunity depends on "whether the sovereign is the real, substantial party in interest," which "turns on the relief sought by the plaintiffs." *Native Am. Distrib.* v. *Seneca–Cayuga Tobacco Co.*, 546 F.3d 1288, 1296, 1297 (10th Cir. 2008) (quoting *Frazier* v. *Simmons*, 254 F.3d 1247, 1253 (10th Cir. 2001)). In arguing that the Tenth Circuit's law is unclear, respondent relies (Br. in Opp. 14-15) on *Burrell* v. *Armijo*, 603 F.3d 825 (10th Cir. 2010), in which the court rejected an effort to subject a tribal governor to a damages action based on his regulation of plaintiffs' activities on tribal farmland leased from the tribe. *Id.* at 832. Although the court used the phrase "sovereign immunity," it did not discuss the distinction between official-capacity and individual-capacity actions recognized in *Native American Distributing*, and the result it reached is readily understandable on the basis of "the right of reservation Indians to make their own laws and be ruled by them" on Indian reservations, a right that necessarily insulates some tribal policymaking from challenge in litigation. *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (quoting *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973)). In the circumstances of this case—which, unlike *Burrell*, does not involve a challenge to a discretionary policy decision by senior tribal officials—there is little reason to doubt that the Tenth Circuit would follow the analysis set out in *Native American Distributing*, nor that that analysis would

lead it to reject the conclusion of the Connecticut Supreme Court.

3. In suggesting that the circuit conflict is "shallow" (Br. in Opp. 8), respondent overlooks that the courts that have already taken a position on the question presented—including the Second, Ninth, and Tenth Circuits—have jurisdiction over a large fraction of the nation's Indian tribes and account for much of the litigation in this area of the law. Moreover, enough courts have taken the Connecticut Supreme Court's side of the conflict that it is unlikely they will all change their position. And because the Ninth Circuit's decisions in *Maxwell* and *Pistor* and the Tenth Circuit's decision in *Native American Distributing* are consistent with this Court's cases distinguishing official-capacity from individual-capacity suits, further consideration will not lead those courts to change their positions and adopt the view of the Connecticut Supreme Court.

B. Individual-capacity actions are defined by the remedy the plaintiff seeks, not the capacity in which the defendant acted

Respondent relies heavily on the theory that suing tribal employees in their individual capacities is merely "a trick of pleading" (Br. in Opp. 20). In his view, the only difference between an official-capacity action and an individual-capacity action is "[t]he label that a plaintiff chooses to attach to a tribal employee" (Br. in Opp. 9), and allowing the availability of sovereign immunity to turn on that distinction would represent "the elevation of form over substance" (Br. in Opp. 13). That argument lacks merit because "the distinction

between official-capacity suits and personal-capacity suits is more than 'a mere pleading device.'" *Hafer* v. *Melo*, 502 U.S. 21, 27 (1991) (quoting *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989)).

As explained in the petition (at 14-16), official-capacity and individual-capacity actions both relate to the conduct of government officials. The difference is that official-capacity actions treat those officials as agents of the sovereign and seek relief from the sovereign. In other words, they "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985) (quoting *Monell* v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)). For that reason, an official-capacity suit "is no different from a suit against the State itself." *Will*, 491 U.S. at 71. By contrast, individual-capacity actions are brought against the official alone and seek relief from the official personally. That has a significant practical effect on the litigation: "[A]n award of damages against an official in his personal capacity can be executed only against the official's personal assets." *Graham*, 473 U.S. at 166.

Because an official-capacity action is really an action against the sovereign, government officials sued in their official capacity benefit from sovereign immunity. *Alden* v. *Maine*, 527 U.S. 706, 756-757 (1999). But those sued in their individual capacity do not. When officials are sued in their individual capacity, whether they acted within the scope of their authority is not "determinative" of the availability of sovereign immunity (Br. in Opp. 10); it is not even relevant.

In suggesting otherwise, respondent makes precisely the error identified by this Court in *Hafer*—he fails to appreciate that "the phrase 'acting in their official capacities,'" when used in describing official-capacity claims, "is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." 502 U.S. at 26. Under *Hafer*, sovereign immunity "does not erect a barrier against suits to impose 'individual and personal liability'" on government officials, even if that liability is based on acts they took in the course of their official duties. *Id.* at 30-31 (quoting *Scheuer* v. *Rhodes*, 416 U.S. 232, 238 (1974)).

C. The decision below is contrary to this Court's cases limiting the scope of sovereign immunity in actions against government officials

In extending sovereign immunity to bar individual-capacity damages actions against tribal employees, the Connecticut Supreme Court applied a version of sovereign immunity significantly broader than that enjoyed by the federal government and the States. Respondent's efforts to resist that conclusion are unavailing.

1. As explained in the petition (at 17-18), the sovereign immunity of the United States does not bar individual-capacity damages actions against federal employees for acts within the scope of their official duties. Respondent observes (Br. in Opp. 25) that many such actions are brought under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and that "[a] *Bivens* action requires a constitutional violation by a government offi-

cial, not merely negligent conduct within the scope of his job." That is true, but it is irrelevant to sovereign immunity. The Court in *Bivens* recognized a cause of action. It did not create an exception to sovereign immunity, and it could not have done so: "However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit." *Id.* at 410 (Harlan, J., concurring in the judgment). In other words, the Court "implied a cause of action against federal officials in *Bivens* in part *because* a direct action against the Government was not available." *FDIC* v. *Meyer*, 510 U.S. 471, 485 (1994). The premise of *Bivens* is that sovereign immunity does not apply to individual-capacity damages actions against federal officers.

Respondent also emphasizes (Br. in Opp. 25) that federal officers are generally immune from suit for non-constitutional torts committed within the scope of their employment. But that immunity is not sovereign immunity; it is a statutory immunity created by Congress. Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563. Before Congress acted, federal employees were *not* immune from individual-capacity actions based on their non-discretionary conduct. *Westfall* v. *Erwin*, 484 U.S. 292 (1988). Congress understood that sovereign immunity did not eliminate the personal liability of government employees, and in the Westfall Act and its predecessor statutes, Congress recognized that legislation was necessary to "exclude suits against employees in their individual capacities." S. Rep. No. 736, 87th Cong., 1st

Sess. 4 (1961); Act of Sept. 21, 1961, Pub. L. No. 87-258, 75 Stat. 539 (individual official immunity for federal drivers); see also S. Rep. No. 1264, 94th Cong., 2d Sess. 3 (1976) ("Defense medical personnel have long been subject to personal liability for actions arising out of their official medical duties."); Act of Oct. 6, 1976 (Gonzalez Act), Pub. L. No. 94-464, 90 Stat. 1985 (individual official immunity for armed forces medical personnel).

2. Respondent argues that state employees enjoy sovereign immunity when sued in their individual capacities, but in fact such actions are common—and not barred by sovereign immunity—under 42 U.S.C. 1983. He attempts to overcome that difficulty by arguing (Br. in Opp. 23) that "Section 1983 abrogates sovereign immunity." That is incorrect. This Court has held that Section 1983 does not authorize a suit against a State, in part because "Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity." *Will*, 491 U.S. at 66. Damages actions against state officials are permissible not because Section 1983 has eliminated sovereign immunity but because "the Eleventh Amendment," which guarantees that immunity, simply "does not erect a barrier against suits to impose 'individual and personal liability' on state officials." *Hafer*, 502 U.S. at 30-31 (quoting *Scheuer*, 416 U.S. at 238).

Respondent points out (Br. in Opp. 24-25) that petitioners could not have brought an action like this one against a Connecticut state employee. But that is not because of sovereign immunity; it is because Connecticut has enacted a statute like the Westfall Act. Conn. Gen. Stat. § 4-165. The existence of that statute con-

firms the general rule that, in the absence of legislation, government officials are not immune from individual damages liability for acts undertaken in the scope of their employment.

3. Respondent emphasizes (Br. in Opp. 26) that the Mohegan Tribe has adopted a statute requiring petitioners to seek relief exclusively from the Tribe in tribal court. The Connecticut Supreme Court did not rely on that statute, and with good reason: the Tribe lacks authority to strip petitioners of their state-law rights by insulating respondent from liability for his off-reservation conduct.

This Court has held that tribes do not possess the authority "to determine their external relations" with non-Indians. *United States* v. *Wheeler*, 435 U.S. 313, 326 (1978). Even within a reservation, "tribes lack civil authority over the conduct of nonmembers on non-Indian fee land." *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 647 (2001). Instead, a tribe's authority over nonmembers is limited to "the activities of nonmembers who enter consensual relationships with the tribe or its members," and to "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Montana* v. *United States*, 450 U.S. 544, 565, 566 (1981). It follows *a fortiori* that a tribe may not assert its jurisdiction to displace the state-law rights of nonmembers based on conduct occurring miles away from the reservation, where the nonmembers' only "relationship" with the tribe was as unsuspecting victims of a tribal employee's negligent driving.

Nor does any principle of federal law, or any interest of tribal sovereignty or self-determination, justify displacing state law in these circumstances. To the contrary, "'Indians going beyond reservation boundaries' are subject to any generally applicable state law," and so are a tribe's non-Indian employees. *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014) (quoting *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U.S. 95, 113 (2005)). As noted in the petition (at 21), respondent's negligent driving constituted an infraction of a Connecticut criminal statute for which respondent was subject to a fine. Respondent has made no effort to explain why he should be immune from civil damages in state court when he is subject to a state criminal fine.

Finally, respondent does not acknowledge the broad implications of the decision below, which applies to all tribes, whether or not they have provided their own tort remedies. Many tribes have not created a tort-claims procedure; many have no court systems at all. Steven W. Perry, U.S. Dep't of Justice, Bureau of Justice Statistics, *Census of Tribal Justice Agencies in Indian Country, 2002*, at iii (2005). As applied in those contexts, the decision below will leave injured plaintiffs with no remedy. That is not, as respondent would have it (Br. in Opp. 3), a result embraced in *Bay Mills*; it is a radical expansion of the immunity recognized in that decision, and an unwarranted curtailment of the ability of a State "to enforce its law on its own lands." *Bay Mills*, 134 S. Ct. at 2035.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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JULY 2016

RECORD
AND
BRIEFS

No. 15-1500

In the Supreme Court of the United States

BRIAN LEWIS, ET AL., PETITIONERS

v.

WILLIAM CLARKE

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the sovereign immunity of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment.

PARTIES TO THE PROCEEDING

Petitioners are Brian Lewis and Michelle Lewis, plaintiffs and appellees below.

Respondent is William Clarke, defendant and appellant below.

The Mohegan Tribal Gaming Authority was initially named as a defendant but was subsequently dismissed from the case and was not a party in the Supreme Court of Connecticut.

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OPINIONS BELOW

The opinion of the Connecticut Supreme Court (Pet. App. 1a-17a) is reported at 320 Conn. 706 and 135 A.3d 677. The opinion of the Connecticut Superior Court (Pet. App. 18a-36a) is unreported but is available at 2014 WL 5354956.

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on March 15, 2016. The petition for a writ of certiorari was filed on June 13, 2016, and was granted on September 29, 2016. The jurisdiction of this court rests on 28 U.S.C. 1257(a).

INTRODUCTION

This Court has held that individual-capacity damages actions against government officials do not implicate sovereign immunity because they do not operate against a sovereign. The Connecticut Supreme Court, however, created a different rule for employees of an Indian tribe. Applying that rule here, it concluded that the victims of negligent driving on an interstate highway in Connecticut—70 miles from an Indian reservation—were prohibited from invoking Connecticut tort law to seek compensation for their injuries in a Connecticut court because the driver who ran into them happened to be an employee of an Indian tribe.

That decision ignores the distinction this Court has long maintained between individual-capacity and official-capacity actions. It extends the sovereign immunity of an Indian tribe to a context—a damages action seeking relief only from an individual employee—in which the sovereign immunity of the United States or a State would not apply. And it gives tribal employees an absolute immunity from suit that undermines the State's interest in deterring wrongful conduct and tort victims' interest in receiving compensation for their injuries.

That expansive immunity has no basis in law or policy. A tribal employee transporting gamblers to and from a casino should not be treated as somehow akin to a foreign ambassador. This Court should reverse the decision below and hold that tribal employees, like all other persons subject to a State's jurisdiction, can be held personally accountable for their wrongful conduct.

STATEMENT

1. On October 22, 2011, petitioners Brian and Michelle Lewis were driving southbound on Interstate 95 in Norwalk, Connecticut, when their car was struck from behind by a limousine driven by respondent William Clarke. The impact propelled the Lewises' car forward with such force that it landed on top of the concrete barrier separating opposite directions of traffic. Both of the Lewises were injured. Pet. App. 2a.

Clarke is a Connecticut resident who holds a Connecticut driver's license. At the time of the accident, he was employed by the Mohegan Tribal Gaming Authority (MTGA), an arm of the Mohegan Tribe of Indians of Connecticut, and his passengers were patrons of the Mohegan Sun Casino, which is approximately 70 miles from Norwalk. Pet. App. 2a.

2. The Lewises brought a negligence action against Clarke in the Connecticut Superior Court. They initially named both Clarke and the MTGA as defendants, but before any of the defendants appeared, the Lewises voluntarily dismissed the MTGA and filed an amended complaint against only Clarke. Pet. App. 3a, 18a-19a.

Clarke moved to dismiss. He argued that the MTGA was entitled to sovereign immunity because it is an arm of the Mohegan Tribe and that he, in turn, was entitled to sovereign immunity because he was an employee of the MTGA acting within the scope of his employment at the time of the accident. Pet. App. 22a.

The Connecticut Superior Court denied the motion to dismiss. Pet. App. 18a-36a. The court applied the test adopted by the Ninth Circuit in *Maxwell* v. *County of San Diego*, 708 F.3d 1075 (2013), under which

tribal employees do not enjoy sovereign immunity when "the remedy sought by the plaintiffs would operate only against them personally." Pet. App. 27a. Here, the court explained, Clarke is "being sued solely in his individual capacity for an alleged tort occurring off the tribal reservation," and "because the remedy sought is not against the MTGA, Clarke is not immune from suit." *Id.* at 25a. The court acknowledged that the MTGA had agreed to indemnify Clarke, but it rejected the suggestion "that the MTGA has the unilateral power to expand the boundaries of sovereign immunity based on tribal legislation, contract or other form of tribal indemnification of an employee." *Id.* at 36a.

3. The Connecticut Supreme Court reversed. Pet. App. 1a-17a. The court stated that "[t]he doctrine of tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority." *Id.* at 10a (quoting *Romanella* v. *Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996), aff'd, 114 F.3d 15 (2d Cir. 1997)) (brackets in original). It noted that "the tribe is neither a party, nor the real party in interest because the remedy sought will be paid by the defendant himself, and not the tribe." Pet. App. 13a. And it acknowledged that, in *Maxwell*, the Ninth Circuit had concluded that sovereign immunity is inapplicable when plaintiffs seek a remedy only from individual tribal employees, not from the tribe itself. *Id.* at 14a. But it reasoned that *Maxwell* was inapposite because that case involved allegations of gross negligence, not ordinary negligence, and "[a]ctions involving claims of more than negligence are often deemed to be outside the scope of

employment and, therefore, not subject to sovereign immunity." *Ibid.* The court concluded that "plaintiffs cannot circumvent tribal immunity by merely naming the defendant, an employee of the tribe, when the complaint concerns actions taken within the scope of his duties and the complaint does not allege, nor have the plaintiffs offered any other evidence, that he acted outside the scope of his authority." *Id.* at 16a-17a. The court therefore remanded with instructions to grant the motion to dismiss. *Id.* at 17a.

SUMMARY OF ARGUMENT

The sovereign immunity of an Indian tribe does not bar individual-capacity damages actions against tribal employees for torts committed within the scope of their employment.

This Court has consistently distinguished between suits seeking relief from a sovereign and suits seeking damages from government employees or representatives. When a plaintiff seeks damages from the sovereign, whether the sovereign is sued directly or through its named officials, sovereign immunity applies. In an official-capacity action, although the official is the nominal defendant, the plaintiff seeks relief that runs against the government. Official-capacity suits thus "represent only another way of pleading an action against an entity of which an officer is an agent," and they may be barred by sovereign immunity. *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985) (quoting *Monell* v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)).

By contrast, sovereign immunity does not bar an individual-capacity damages action, even if the action arises out of conduct the official undertook while car-

rying out official duties. That is because in an individual-capacity action, the plaintiff seeks to impose personal liability on the official, and any award of damages "can be executed only against the official's personal assets." *Graham*, 473 U.S. at 166. This understanding of sovereign immunity is confirmed by examining actions against federal and state employees. This Court has repeatedly held that the sovereign immunity of the United States does not bar individual-capacity damages actions against federal employees, and that state sovereign immunity does not bar individual-capacity damages actions against state employees.

The rule should be no different here. This Court has never suggested that tribal sovereign immunity is broader than the immunity enjoyed by the United States or the States. The policies underlying immunity do not support expanding tribal sovereign immunity to bar individual-capacity damages actions against tribal employees: doing so is not necessary to protect the sovereign dignity of Indian tribes or to protect the tribal fisc, nor is it needed to protect tribal autonomy and self-government. On the other hand, barring state-law tort actions against individual tribal employees would represent an unwarranted intrusion on state regulatory authority and would deprive tort victims of compensation.

An Indian tribe has the power to enact statutes permitting the resolution of tort claims in tribal court, but it cannot expand its sovereign immunity from suit in other forums. Even within a reservation, a tribe has only limited authority to legislate with respect to nonmembers. In the circumstances of this case, a tribe does not have the authority to deprive nonmember

tort victims of their state-law right to recover for their injuries.

ARGUMENT

A. Sovereign immunity does not apply to actions seeking relief from individual government officials

This Court has held that "damages actions against public officials require[] careful adherence to the distinction between personal- and official-capacity suits." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985). Because an official-capacity action operates against the sovereign, government officials sued in their official capacity may assert sovereign immunity. *Id.* at 165-166. By contrast, individual-capacity actions—also referred to as personal-capacity actions—do not implicate sovereign immunity because a "victory in a personal-capacity action is a victory against the individual defendant," not the sovereign. *Id.* at 167.

1. "Official-capacity suits * * * 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" *Graham*, 473 U.S. at 165 (quoting *Monell* v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)). Such a suit "is not a suit against the official but rather is a suit against the official's office. As such it is no different from a suit against the State itself." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (citation omitted); accord *Graham*, 473 U.S. at 166 ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."). Recognizing the reality that an official-capacity suit is one against the office, not the individual officeholder, the Federal

Rules of Civil Procedure provide that "[a]n action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending." Fed. R. Civ. P. 25(d). Instead, "[t]he officer's successor is automatically substituted as a party." *Ibid.*; accord Fed. R. App. P. 43(c)(2); Sup. Ct. R. 35.3. And if damages are awarded in an official-capacity action, "a plaintiff seeking to recover * * * must look to the government entity itself." *Graham*, 473 U.S. at 166; see *Brandon* v. *Holt*, 469 U.S. 464, 471 (1985) ("[A] judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents.").

"Personal-capacity suits," by contrast, "seek to impose personal liability upon a government official for actions he takes under color of state law." *Graham*, 473 U.S. at 165. While "officers sued for damages in their official capacity * * * assume the identity of the government that employs them," officers who are "sued in their personal capacity come to court as individuals." *Hafer* v. *Melo*, 502 U.S. 21, 27 (1991). That distinction "is more than 'a mere pleading device,'" *ibid.* (quoting *Will*, 491 U.S. at 71), and it has important consequences in litigation. If the defendant in an individual-capacity action leaves office, the defendant's successor is not automatically substituted. If the defendant dies, "the plaintiff would have to pursue his action against the decedent's estate." *Graham*, 473 U.S. at 166 n.11. And, most importantly, any "award of damages against an official in his personal capacity can be executed only against the official's personal assets," not against the government. *Id.* at 166.

2. Because an official-capacity action is really an action against the sovereign, government officials sued in their official capacity may assert sovereign immunity. "The general rule," this Court has observed, "is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963) (per curiam). In other words, when a plaintiff seeks relief "against the sovereign, although nominally directed against the individual officer," then the plaintiff's "suit is barred, not because it is a suit against an officer of the Government, but because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction." *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949); accord *Alden* v. *Maine*, 527 U.S. 706, 756 (1999) (explaining that "sovereign immunity is not limited to suits which name the State as a party if the suits are, in fact, against the State"); *In re Ayers*, 123 U.S. 443, 506 (1887) (Sovereign immunity covers "not only suits brought against a State by name, but those also against its officers, agents, and representatives, where the State, though not named as such, is, nevertheless, the only real party * * * against which the judgment or decree effectively operates.").

By contrast, sovereign immunity does not bar damages actions against officials in their individual capacity. As a leading treatise explains, "[t]he Anglo-American tradition did not include a general theory of immunity from suit or from liability on the part of public officers." 5 Fowler V. Harper et al., *Harper, James and Gray on Torts* § 29.8, at 786 (3d ed. 2008). While "[i]n some circumstances [a] suit against an officer will

in reality be a suit against the state, so that its allowance would circumvent the state's own immunity," that "would seldom, if ever, be the case if the action is to recover tort damages out of the officer's own pocket." *Id.* § 29.9, at 790. Accordingly, this Court has held that if an officer's conduct is "such as to create a personal liability, whether sounding in tort or in contract, the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit against him." *Larson*, 337 U.S. at 686; accord *Alden*, 527 U.S. at 757 ("Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally.").

3. In the decision below, the Connecticut Supreme Court expressly rejected what it called "the 'remedy sought' approach" as articulated in *Maxwell* v. *County of San Diego*, 708 F.3d 1075, 1088-1089 (9th Cir. 2013)—that is, an inquiry into whether the relief sought in the litigation would run against the sovereign or only against the officer personally. Pet. App. 16a. Instead, the court focused on the capacity in which the defendant was alleged to have acted; in its view, the critical fact was Clarke's status as "an employee of the tribe [who] was acting within the scope of his employment when the accident occurred." *Ibid.* The other courts that have taken the same position as the court below have employed similar reasoning. See, *e.g.*, *Chayoon* v. *Chao*, 355 F.3d 141, 143 (2d Cir.) (holding that a plaintiff "cannot circumvent tribal immunity by merely naming officers or employees of the

Tribe when the complaint concerns actions taken in defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority"), cert. denied, 543 U.S. 966 (2004); *Koke* v. *Little Shell Tribe of Chippewa Indians of Mont., Inc.*, 68 P.3d 814, 817 (Mont. 2003) (sovereign immunity barred an action against tribal officials because "the tribal officials acted in their official capacities" in the events giving rise to the litigation).

That approach is contrary to this Court's cases, which make clear that "the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign." *Larson*, 337 U.S. at 687. And "[i]n a suit against the officer to recover damages for the agent's personal actions that question is easily answered" because "[t]he judgment sought will not require action by the sovereign or disturb the sovereign's property." *Ibid.*

In focusing on whether Clarke was *acting* in his official capacity, the court below ignored this Court's instruction to determine whether a defendant is being *sued* in his official capacity. Pet. App. 10a (observing that Clarke was "acting in [his] representative capacity and within the scope of [his] authority" at the time of the accident) (quoting *Romanella* v. *Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996), aff'd, 114 F.3d 15 (2d Cir. 1997)). As this Court has explained, "the phrase 'acting in their official capacities,'" when used in describing official-capacity claims, "is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." *Hafer*, 502 U.S. at 26. In other words, the "bar against official-capacity claims * * * does

not mean that tribal officials are immunized from individual-capacity suits *arising out of* actions they took in their official capacities"; instead, immunity extends only to "suits brought against them *because of* their official capacities—that is, because the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe." *Native Am. Distrib.* v. *Seneca–Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008).

For that reason, in an individual-capacity action, "whether defendants were acting in their official capacities under color of state or under color of tribal law is wholly irrelevant" to the availability of sovereign immunity. *Pistor* v. *Garcia*, 791 F.3d 1104, 1114 (9th Cir. 2015). An individual-capacity suit against an officer always "seeks to hold the officer personally liable for wrongful conduct taken *in the course of her official duties*," but "[a]s the officer *personally* is the target of the litigation, she may not claim sovereign immunity." *Ibid.*; accord *Hafer*, 502 U.S. at 28. The principle of sovereign immunity simply "does not erect a barrier against suits to impose 'individual and personal liability'" on government officials, even if that liability is based on acts they performed in the course of their official duties. *Hafer*, 502 U.S. at 30-31 (quoting *Scheuer* v. *Rhodes*, 416 U.S. 232, 238 (1974)).

B. The law governing actions against federal and state officials provides additional evidence that sovereign immunity does not apply to individual-capacity damages actions

As explained above, the conclusion that sovereign immunity does not bar individual-capacity damages

actions follows from this Court's statements about the nature of such actions. That conclusion is also supported by a long history of litigation against both federal and state officials.

1. The sovereign immunity of the United States does not bar damages actions against federal officials

In the absence of an express statutory waiver, "[s]overeign immunity shields the United States from suit." *United States* v. *Bormes*, 133 S. Ct. 12, 16 (2012). But the sovereign immunity of the United States does not prohibit individual-capacity damages actions against federal officers. Examples of such actions are plentiful.

One common type of damages action against federal officials is that brought under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for certain constitutional violations. In a *Bivens* action, the plaintiff seeks to recover damages from the defendants in their individual capacities. *Bivens* actions are possible not because the Constitution creates an exception to sovereign immunity but rather because imposing individual monetary liability on federal officers is consistent with that immunity. That principle is illustrated by *Bivens* itself, in which the Court recognized a cause of action for constitutional violations while acknowledging that it could not create an exception to federal sovereign immunity: "However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit." *Id.* at 410 (Harlan, J., concurring in the judgment).

The Court "implied a cause of action against federal officials in *Bivens* in part *because* a direct action against the Government was not available." *FDIC* v. *Meyer*, 510 U.S. 471, 485 (1994). The premise of *Bivens*, therefore, is that sovereign immunity applies to actions against the government but does not apply to individual-capacity damages actions against federal officers. See *Consejo de Desarrollo Economico de Mexicali, A.C.* v. *United States*, 482 F.3d 1157, 1173 (9th Cir. 2007) (explaining that a *Bivens* plaintiff "seeks to impose personal liability upon a federal official" and that "a *Bivens* suit against a defendant in his or her official capacity would merely be another way of pleading an action against the United States, which would be barred by the doctrine of sovereign immunity").

Another type of damages action that has historically been available against federal officials is one based on state tort law. Congress has passed a series of statutes addressing such actions, and the premise of all of those statutes is that sovereign immunity is not a barrier to damages actions against individual officials.

Early in the Nation's history, Congress provided for the removal to federal court of state-court claims against federal officers "for any thing done, or omitted to be done, as an officer of the customs." Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 198. That act was the predecessor of the modern federal-officer removal statute, which now permits the removal of any state-court civil action against "any officer * * * of the United States * * * in an official or individual capacity, for or relating to any act under color of such office." 28 U.S.C. 1442(a)(1); see *Watson* v. *Philip Morris Cos.*, 551 U.S.

142, 147-149 (2007) (describing the history of the statute). "[T]he main point" of the statute, this Court has observed, "is to give officers a federal forum in which to litigate the merits of immunity defenses." *Id.* at 151 (quoting *Jefferson Cty.* v. *Acker*, 527 U.S. 423, 447 (1999) (Scalia, J., concurring in part and dissenting in part)). Litigating those official immunity defenses would be unnecessary, of course, if such actions were barred by sovereign immunity.

In 1961, Congress enacted a statute providing that an action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, would be the exclusive remedy "for damage to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment." Act of Sept. 21, 1961 (Federal Drivers Act), Pub. L. No. 87-258, 75 Stat. 539. In so doing, it barred tort actions against individual federal employees based on motor-vehicle accidents. Explaining the purpose of the legislation, the House Judiciary Committee observed that while FTCA actions were already available to the victims of accidents involving government-employee drivers, accident victims could choose to sue the employees as individuals. As a result, "all of the persons who operate vehicles for the United States face the possibility of being sued as individuals for incidents which occur while they are performing duties in behalf of the Government." H.R. Rep. No. 297, 87th Cong., 1st Sess. 2 (1961); see *id.* at 3 (describing examples of tort claims that had been asserted against individual government employees). Because the sovereign immunity of the United States did

not preclude such actions, Congress recognized that only legislation could "exclude suits against employees in their individual capacities." S. Rep. No. 736, 87th Cong., 1st Sess. 4 (1961).

Congress subsequently enacted similar statutes to bar medical-malpractice actions against individual federal employees. See Act of Oct. 8, 1976 (Gonzalez Act), Pub. L. No. 94-464, 90 Stat. 1985 (Armed Forces medical personnel); Foreign Relations Authorization Act, Fiscal Year 1977, Pub. L. No. 94-350, § 119, 90 Stat. 828 (State Department medical personnel); Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, § 4, 84 Stat. 1870 (Public Health Service); Act of Oct. 31, 1965, Pub. L. No. 89-311, § 6, 79 Stat. 1156 (Veterans Administration medical personnel). As in the context of federal drivers, the House Judiciary Committee recognized that if a "claimant chooses to sue the officer or employee individually in a state court for alleged malpractice," then "the only advantage [the defendant] has is to remove the case to a Federal District Court and be represented by the Department of Justice. If the defendant loses the case *he* must pay the judgment." H.R. Rep. 333, 94th Cong., 1st Sess. 2 (1975); see S. Rep. No. 1264, 94th Cong., 2d Sess. 3 (1976) ("Defense medical personnel have long been subject to personal liability for actions arising out of their official medical duties.").

Then, in 1988, this Court decided *Westfall* v. *Erwin*, 484 U.S. 292, holding that state-law tort suits against federal officers may be subject to an individual "official immunity"—*not* to sovereign immunity—but that the individual immunity is limited to situations in which "the challenged conduct is within the outer pe-

rimeter of an official's duties and is discretionary in nature." *Id.* at 300. The Court observed that "absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct" and that "absolute immunity for federal officials is justified only when 'the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens.'" *Id.* at 295-296 (quoting *Doe* v. *McMillan*, 412 U. S. 306, 320 (1973)).

The decision in *Westfall* left plaintiffs free to pursue individual-capacity damages actions against federal officials whose conduct was not discretionary. Congress altered that rule by enacting the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, commonly known as the Westfall Act. The Westfall Act makes an FTCA action against the United States the exclusive remedy for any "injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment," and, with limited exceptions, it forecloses tort actions against individual federal employees. 28 U.S.C. 2679(b)(1). The *Westfall* decision and the Westfall Act provide further evidence that the sovereign immunity of the United States does not eliminate the personal liability of federal employees.[1]

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[1] The Westfall Act does not apply to this case because it governs only actions against federal employees. Under the Indian Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, and the Necessary and Proper Clause, U.S. Const. Art. I, § 8, Cl. 18, Congress

2. State sovereign immunity does not bar damages actions against state officials

The "fundamental postulates implicit in the constitutional design," *Alden*, 527 U.S. at 729, include the principles that "each State is a sovereign entity in our federal system" and that immunity from suit is "inherent in the nature of sovereignty," *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 54 (1996) (internal quotation marks omitted). State sovereign immunity is protected by the Eleventh Amendment. But as in the federal context, sovereign immunity does not bar actions "against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself." *Alden*, 527 U.S. at 757; *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 462 (1945) ("Where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally."), overruled on other grounds, *Lapides* v. *Board of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2002).

Individual-capacity damages actions are commonly brought against state officials under 42 U.S.C. 1983. In opposing the petition for a writ of certiorari, Clarke suggested (Br. in Opp. 23) that such actions are possi-

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likely would have authority to enact a similar statute governing actions against tribal officials; if it were to do so, it could consider whether to extend immunity to employees of tribal commercial enterprises. As explained below, however, see pp. 29-31, *infra*, the legislative authority of an Indian tribe is significantly more limited than that of Congress or a state legislature.

ble only because "Section 1983 abrogates sovereign immunity," but that is incorrect. This Court has held that Section 1983 does not authorize a suit against a State, in part because "Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity." *Will*, 491 U.S. at 66; accord *Graham*, 473 U.S. at 169 n.17. Thus, damages actions against state officials are permissible not because Section 1983 has eliminated sovereign immunity but because "the Eleventh Amendment," which guarantees that immunity, simply "does not erect a barrier against suits to impose 'individual and personal liability' on state officials." *Hafer*, 502 U.S. at 30-31 (quoting *Scheuer*, 416 U.S. at 238).

Sovereign immunity also does not create a barrier to non-constitutional tort actions against individual state employees. As a consequence, many States have adopted legislation to regulate such actions. In some States, statutes provide for the indemnification of employees who are subject to individual liability based on the performance of their official duties. See, *e.g.*, Cal. Gov't Code Ann. § 825; Colo. Rev. Stat. Ann. § 24-10-110; Kan. Stat. Ann. § 75-6109; La. Stat. Ann. § 13:5108.1; Me. Rev. Stat. Ann. tit. 14, § 8112; Mich. Comp. Laws Ann. § 691.1408; N.Y. Pub. Off. Law § 17; Or. Rev. Stat. Ann. § 30.285. Other States have enacted statutes like the Westfall Act that make an action against the State the exclusive remedy for torts committed by state employees, thereby barring suits against the employees themselves. See, *e.g.*, Alaska Stat. Ann. § 09.50.253; Conn. Gen. Stat. Ann. § 4-165; Fla. Stat. Ann. § 768.28; Ga. Code Ann. § 50-21-25; Iowa Code Ann. § 669.5; Mass. Gen. Laws Ann. ch.

258, § 2; N.D. Cent. Code Ann. § 32-12.2-03; S.D. Codified Laws § 21-32-17. The existence of those statutes confirms the general rule that, in the absence of legislation, state officials are not immune from individual damages liability for acts within the scope of their employment.

C. Tribal sovereign immunity should not be extended to bar individual-capacity damages actions against tribal officials

In holding that tribal sovereign immunity bars Clarke's claims, the Connecticut Supreme Court interpreted tribal sovereign immunity to be broader than that of both the United States and the States. That expansion cannot be justified by reference to the traditional understanding of sovereign immunity; it is not supported by the policies underlying immunity; and it represents an unwarranted intrusion on state regulatory authority.

1. Tribal sovereign immunity is no broader than the sovereign immunity of the United States or the States

As "domestic dependent nations," Indian tribes enjoy some of the attributes of sovereignty. *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). One such attribute is sovereign immunity, and for that reason, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978). Insofar as tribal sovereign immunity rests on the "traditional[]" understanding of the immunity "enjoyed by sovereign powers," that immunity should not extend more

broadly than that of other sovereigns, such as the United States and the States. *Ibid.*; see *Maxwell*, 708 F.3d at 1089 ("We see no reason to give tribal officers broader sovereign immunity protections than state or federal officers given that tribal sovereign immunity is coextensive with other common law immunity principles.").

Nothing in this Court's cases suggest that tribal sovereign immunity is broader than that of the States or the federal government. To the contrary, this Court has recognized that it is narrower in some respects: "[B]ecause of the peculiar 'quasi-sovereign' status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy." *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Eng'g*, 476 U.S. 877, 890 (1986). There is accordingly no basis in precedent for a broad rule of tribal sovereign immunity that would insulate tribal employees from individual-capacity damages actions.

This Court has expressed concerns about the scope of tribal sovereign immunity. In *Kiowa Tribe of Oklahoma* v. *Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), the Court recognized that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine" of tribal sovereign immunity. *Id.* at 758. As the Court observed, the doctrine "extends beyond what is needed to safeguard tribal self-governance"; it is "inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities"; and it "can harm those who are unaware that they are dealing with a tribe * * * or who have no choice in the matter, as in the case of tort victims."

Id. at 757-758. In *Kiowa*, the Court nevertheless adhered to the doctrine of tribal sovereign immunity because of principles of *stare decisis*. *Id.* at 760 ("[W]e decline to revisit our case law and choose to defer to Congress."). It did the same in *Michigan* v. *Bay Mills Indian Community*, 134 S. Ct. 2024, 2036 (2014) ("[T]his Court does not overturn its precedents lightly."). In so doing, however, the Court noted that it had "never * * * specifically addressed * * * whether immunity should apply in the ordinary way" in the circumstances of this case—that is, when "a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct." *Id.* at 2036 n.8.

The Connecticut Supreme Court's decision disregards those considerations to extend immunity to a kind of action that the doctrine of sovereign immunity never previously covered. This case presents no occasion for this Court to decide whether the sovereign immunity of the Mohegan Tribe itself extends to tort claims arising from off-reservation commercial conduct. That issue was not raised below, and it is not within the scope of the question presented. But the Court's expression of doubt as to the existence of tribal sovereign immunity in this context counsels strongly against expanding that immunity to bar tort claims against individual tribal employees.[2]

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[2] Clarke has not argued that he enjoys any personal official immunity. Any such argument would be outside the scope of the question presented and would lack merit in any event. This Court has never held that the official immunity addressed in *Westfall* extends to officials of Indian tribes, and the principles of federal supremacy that support official immunity for federal em-

2. Barring claims against individual officials would not serve the purposes of sovereign immunity

This Court has identified several interests that sovereign immunity promotes. Extending immunity to bar claims against individual tribal officials would not serve those interests.

First, suits against tribal employees do not impair a tribe's sovereign dignity. In the context of state immunity, this Court has observed that "the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts." *Federal Mar. Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 760 (2002); see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) ("The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.") (quoting *Ayers*, 123 U.S. at 505). Suits seeking relief only from a tribe's employees, however, do not force the tribe "to answer the complaints of private parties" and thus do not impair that sovereign dignity.

Second, suits against tribal employees do not "threaten the financial integrity" of a tribe. *Alden*,

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ployees are not applicable to tribal employees. In addition, to the extent that the distinction between discretionary and non-discretionary conduct is relevant to determining whether an individual-capacity action would be barred, the conduct at issue in this case—driving a limousine to transport casino patrons—cannot be characterized as the sort of discretionary conduct that this Court held to be protected in *Westfall*.

527 U.S. at 750; see *South Carolina State Ports Auth.*, 535 U.S. at 765 ("[S]overeign immunity serves the important function of shielding state treasuries."). As explained above, a judgment in an individual-capacity action may be enforced only against the employee's personal assets, not against the tribe itself. Some tribes, of course, may choose to indemnify their employees for damage awards. See, *e.g.*, Mohegan Tribal Code §§ 2-27, 4-51 *et seq.* But that unilateral decision does not expand the scope of immunity. This Court has observed that "private suits for money damages" directly against sovereigns may impair their "ability to govern in accordance with the will of their citizens" because such suits will mean that "the allocation of scarce resources among competing needs" will be determined by courts rather than through "deliberation by the political process established by the citizens." *Alden*, 527 U.S. at 750-751. Indemnification, by contrast, reflects a tribe's voluntary decision in accordance with "the will of [its] citizens." If a tribe finds that indemnification is unduly burdensome, it can choose not to engage in it, or to engage in it only in a limited fashion. For example, as the Mohegan Tribe has done, it may choose not to indemnify employees who engage in "wanton, reckless or malicious" activity. Mohegan Tribal Code § 4-52. A tribe thus remains free to make its own decisions about "the allocation of scare resources." *Alden*, 527 U.S. at 751.

Third, suits against tribal employees do not threaten tribal autonomy or self-governance. In *Kiowa*, this Court observed that "the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments

by States." 523 U.S. at 758. In some contexts, the application of state law may "infringe[] on the right of reservation Indians to make their own laws and be ruled by them." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (quoting *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973)). In those cases, federal laws and policies may preempt the application of certain state laws to on-reservation activity, unless the state interests at stake are sufficient to justify the assertion of state authority. See *Mescalero Apache Tribe*, *supra*; *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980). But the application of nondiscriminatory rules of state tort law to the off-reservation conduct of tribal employees does not implicate those considerations. See *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-149 (1973) ("Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.").

That is especially so where, as here, the employees are engaged in a commercial activity. Commercial activities conducted by tribes may help fund governmental functions, but that does not alter their fundamentally commercial nature, nor does it mean that they implicate tribal self-governance. See *Solis* v. *Matheson*, 563 F.3d 425, 434 (9th Cir. 2009) ("[T]here is nothing * * * involving self-governance about the employment of Indians and non-Indians by a retail business engaged in interstate commerce."); *Florida Paraplegic Ass'n* v. *Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1129 (11th Cir. 1999) (concluding that "a commercial enterprise open to non-Indians from which

the Tribe intends to profit * * * does not relate to the governmental functions of the Tribe"); *Reich* v. *Mashantucket Sand & Gravel*, 95 F.3d 174, 181 (2d Cir. 1996) (concluding that a tribe's "employment of non-Indians weighs heavily against its claim that its activities affect rights of self-governance in purely intramural matters," and observing that "tribal relations with non-Indians fall outside the normal ambit of tribal self-government").

3. Actions against tribal employees serve important state interests

Individual-capacity damages actions against tribal employees can serve important state regulatory interests. Expanding sovereign immunity to bar such claims would impair those interests.

Even within an Indian reservation, a State has considerable regulatory authority. This Court's "cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation." *Nevada* v. *Hicks*, 533 U.S. 353, 361 (2001); see *ibid.* ("State sovereignty does not end at a reservation's border."). And the State's authority is greater still outside of a reservation. Thus, when this Court reaffirmed in *Bay Mills* that tribes do not give up their sovereign immunity by engaging in off-reservation commercial activity, it emphasized that tribal officials would remain subject to state regulation and that a State would retain a "panoply of tools * * * to enforce its law on its own lands." 134 S. Ct. at 2035. It observed that "to the extent civil remedies proved inadequate, [a State] could resort to its criminal law." *Ibid.* Those state-

ments are consistent with the principle that a State, unlike an Indian tribe, retains "the power to enforce laws against all who come within the sovereign's territory." *Duro* v. *Reina*, 495 U.S. 676, 685 (1990); see *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005).

Tort judgments are an important means by which a State "enforce[s] its law on its own lands." *Bay Mills*, 134 S. Ct. at 2035. As this Court has explained, "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Cipollone* v. *Liggett Grp., Inc.*, 505 U.S. 504, 521 (1992) (plurality opinion) (quoting *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959)); see *Restatement (Second) of Torts* § 901 (1979). When an enterprise enjoys sovereign immunity, it need not comply with rules of conduct established by state tort law, including taking precautions to prevent accidents, because it will not be forced to internalize the cost of its misconduct. In that context, the only way to deter tortious conduct is by allowing the victims of a wrong to seek a remedy from the individuals who injured them.

Tort law also serves a State's policy of ensuring compensation for victims. Because sovereign immunity may bar a suit against a tribe itself, an action against the individual tortfeasor is the only way for the victim of a tort committed by a tribal employee to receive the compensation that state law provides. Of course, it is possible that some tribes may choose to waive immunity to allow tort suits directly against the tribe. Under the Mohegan Tribal Code, for example, a person injured in circumstances such as those of this

case may bring a claim, but only in the Mohegan Gaming Disputes Court. See Mohegan Tribal Code § 3-248(a). Such a proceeding carries no right to a jury trial, and any award is subject to strict limits on non-economic damages and to a prohibition on punitive damages and damages for loss of consortium. Mohegan Tribal Code §§ 3-248(d), 3-251(a). More importantly, that remedy exists only at the grace of the Tribe. Many tribes have not created a tort-claims procedure; many have no court systems at all. Steven W. Perry, U.S. Dep't of Justice, Bureau of Justice Statistics, *Census of Tribal Justice Agencies in Indian Country, 2002*, at iii (2005). As applied in those settings, an extension of tribal sovereign immunity to bar actions against tribal employees will leave injured plaintiffs with no remedy.

In the context of commercial disputes, the potential for unfairness of a broad application of tribal sovereign immunity may be limited because parties dealing with tribes can contract for a waiver of immunity. See, *e.g.*, *C & L Enters., Inc.* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (tribe waived immunity by agreeing to a contract with an arbitration clause). Similarly, as this Court observed in *Bay Mills*, a State seeking the ability to sue a tribe "need only bargain for a waiver of immunity" when negotiating a gaming compact. 134 S. Ct. at 2035. But that is not true of "a tort victim, or other plaintiff who has not chosen to deal with a tribe." *Id.* at 2036 n.8. That reality is vividly illustrated by the facts of this case: As they were driving on an interstate highway 70 miles away from the Mohegan Tribe's reservation, the Lewises had no reason to anticipate that a tribal

employee would run into them, and thus they had no occasion to negotiate a waiver of immunity. It would be unfair and anomalous to apply sovereign immunity to deprive them of their state-law right to seek compensation for their injuries in a state court.

D. A tribe cannot expand its sovereign immunity by statute

In opposing the petition for a writ of certiorari, Clarke emphasized (Br. in Opp. 25-26) that the Mohegan Tribe has adopted a statute providing for the resolution of tort claims in a proceeding against the Tribe (not an individual tribal employee) in tribal court. The statute also provides that "[t]he sovereign immunity of The Mohegan Tribe shall attach * * * to the actions or inactions of any individual acting on behalf of The Mohegan Tribe." Mohegan Tribal Code § 4-116(c); see also Mohegan Tribal Code § 3-249(a) ("Venue for tort claims * * * against authorized representatives of the MTGA acting within the scope of their employment, shall be found exclusively in the Mohegan Gaming Disputes Court."). The Connecticut Supreme Court did not rely on those statutes, and with good reason. While the Tribe has the authority to limit the jurisdiction of its own courts, it may not limit the jurisdiction of the Connecticut courts, and it may not strip petitioners of their state-law rights by insulating Clarke from liability for his off-reservation conduct.

This Court has held that tribes do not possess the authority "to determine their external relations" with non-Indians. *United States* v. *Wheeler*, 435 U.S. 313, 326 (1978). Even within a reservation, "tribes lack civil authority over the conduct of nonmembers on non-

Indian fee land." *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 647 (2001). Instead, tribal sovereignty "centers on the land held by the tribe and on tribal members within the reservation." *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008); see also *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975) (tribes retain authority to govern "both their members and their territory"). For that reason, "tribes do not, as a general matter, possess authority over non-Indians who come within their borders." *Plains Commerce Bank*, 554 U.S. at 328.

Within its territory, the legislative authority of an Indian tribe is limited. Tribes "have lost any 'right of governing every person within their limits except themselves,'" subject to two narrow exceptions. *Montana* v. *United States*, 450 U.S. 544, 565 (1981) (quoting *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978)). Under the first exception, tribes may regulate "nonmembers who enter consensual relationships with the tribe or its members." *Ibid.*; see *Strate* v. *A–1 Contractors*, 520 U.S. 438, 456-457 (1997)). Under the second exception, tribes may regulate nonmember conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. While the second exception may appear broad when "[r]ead in isolation," it is limited to "'what is necessary to protect tribal self-government or to control internal relations.'" *Strate*, 520 U.S. at 459 (quoting *Montana*, 450 U.S. at 564). The conduct to be regulated "must do more than injure the tribe, it must 'imperil the subsistence' of the tribal communi-

ty." *Plains Commerce Bank*, 554 U.S. at 341 (quoting *Montana*, 450 U.S. at 566).

Even within a tribe's territory, neither of the *Montana* exceptions would empower a tribe to eliminate the common-law right to maintain individual-capacity suits against tortfeasors. As a general matter, tort victims have not entered into a consensual agreement with a tribe, nor have they engaged in an activity that imperils tribal welfare. While a tribe may have the authority to regulate its employees, it may not regulate unconsenting third parties by depriving them of rights they would otherwise enjoy. And that conclusion has even greater force where, as here, a claim arises out of off-reservation conduct. In these circumstances, allowing a tribe to strip tort victims of their right to bring state-law causes of action in state court would represent an unprecedented expansion of tribal legislative authority.

CONCLUSION

The judgment of the Connecticut Supreme Court should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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NOVEMBER 2016

RECORD AND BRIEFS.

No. 15-1500

IN THE

Supreme Court of the United States

BRIAN LEWIS, ET AL.,

Petitioners,

v.

WILLIAM CLARKE,

Respondent.

On Writ of Certiorari to the Supreme Court of Connecticut

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QUESTION PRESENTED

Whether the sovereign immunity of a federally recognized Indian Tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment.

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IN THE

Supreme Court of the United States

No. 15-1500

BRIAN LEWIS, ET AL.,

Petitioners,

v.

WILLIAM CLARKE,

Respondent.

On Writ of Certiorari to the
Supreme Court of Connecticut

BRIEF FOR RESPONDENT

INTRODUCTION

Petitioners allege that they were injured by Respondent, an employee of the Mohegan Tribe of Indians, while he was acting within the scope of his employment. They brought this damages suit in Connecticut court, with the aid of a pleading maneuver and a bit of happenstance.

First, the pleading maneuver. Petitioners agree that, at the time of the accident, Respondent was driving a tribal vehicle and acting at the behest of the Tribe. They also agree that sovereign immunity prevents them from suing the Tribe in state court for their damages. And they agree that, as a matter of tribal law, the Tribe must pay every cent of any damages award against Respondent. But because they sued Respondent "individually" rather than

suing the Tribe, Petitioners argue that they can seek damages from the Tribe's treasury, free of the inconveniences of sovereign immunity. This Court's sovereign immunity jurisprudence is more nuanced than that; it looks past the caption to identify the "real party in interest." The Tribe bears the financial burden of any adverse judgment here, so it is the real party in interest.

Second, the happenstance. In the event that Petitioners succeed in circumventing sovereign immunity, their suit depends on the fortuity that this case involves a *tribal* employee, as opposed to an employee of any other sovereign. If the same car accident had involved a federal employee or a foreign employee, then official immunity would clearly bar this suit. If the same car accident had involved a Connecticut employee, then a Connecticut statute would bar this suit. And if the same car accident had involved an employee of another State that, like Connecticut and the Tribe, immunizes its own employees, then comity and the Constitution would bar this suit. Only because this case involves a tribal employee can Petitioners argue that they have found a loophole—one that this Court should close. Tribal employees should receive the same common-law immunity from state tort suits that federal employees receive, including immunity from the suit here.

Under either sovereign immunity or official immunity, then, the Connecticut Supreme Court was right: Petitioners' suit should not proceed in state court. That result does not leave Petitioners without a remedy. The State of Connecticut and the Tribe have contractually agreed to a full, fair tribal tort system. Petitioners could have and should have sought relief there.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Mohegan Constitution, the Mohegan Tribal Code, the Connecticut General Statutes, and the Federal Tort Claims Act are reprinted in the addendum.

STATEMENT

A. Statutory Background

1. The Mohegan Tribe is a federally recognized Indian Tribe located in Connecticut. 59 Fed. Reg. 12,140 (Mar. 15, 1994). Its reservation comprises approximately one square mile on the western bank of the Thames River; a Connecticut state highway bisects that land. The Tribe also controls about ten other parcels, held in trust or owned in fee, that are separated by miles of Connecticut roads. *See* Mohegan Tribe, *Plan Showing Trust and Fee Lands of the Mohegan Tribe of Indians of Connecticut* (Dec. 2016), https://goo.gl/qpwQGs. On behalf of its members, the Tribe maintains a police force, manages a court system, provides social assistance, and negotiates agreements with States and the Federal Government, among other functions. *See, e.g.*, Mohegan Const. art. IX, § 2; Mohegan Tribal Code chs. 5-6.[1]

In 1994, the Tribe and Connecticut entered into a Gaming Compact pursuant to the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (1988) (25 U.S.C. § 2701 *et seq.*). *See* Mohegan Tribe – State of Connecticut Gaming Compact (May 17, 1994) (Gaming Compact or Com-

[1] Links to the Mohegan Tribal Code can be found at mohegan.nsn.us/government/tribal-court-system.

pact), https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-026002.pdf; 59 Fed. Reg. 65,130 (Dec. 16, 1994) (approving the Compact). That Compact authorizes the Tribe to conduct Class III gaming on its reservation, subject to several conditions. Gaming Compact § 3; *see id.* §§ 3(c)-(f), 5, 9, 14 (establishing licensing, registration, operations, and health and safety requirements). One of those conditions states that the Tribe must establish "reasonable procedures for the disposition of tort claims arising from alleged injuries to patrons of its gaming facilities." *Id.* § 3(g). Although the Compact does not itself "waive[] [the Tribe's] sovereign immunity from suit with respect to such claims," it requires the Tribe to maintain "a remedial system analogous to that available for similar claims arising against the State or such other remedial system as may be appropriate following consultation with the State gaming agency." *Id.*

2. The Tribe created two specialized governmental entities to carry out its obligations under the Gaming Compact. First, the Tribe established the Mohegan Tribal Gaming Authority (MTGA) to exercise "[a]ll governmental and proprietary powers of the Mohegan Tribe over the development, construction, operation, promotion, financing, regulation and licensing" of tribal gaming activities. Mohegan Const. art. XIII, § 1; *see* Mohegan Tribal Code § 2-21. Both IGRA and the Mohegan Tribal Code require the Tribe to use gaming revenues to improve the welfare of its members and to further governmental activities. *See* 25 U.S.C. § 2710(b)(2)(B); Mohegan Tribal Code §§ 2-21, 2-181, 2-182; *see also* Gaming Compact § 16. As the parties thus agree, the MTGA is an arm of the Tribe and shares the Tribe's sovereign immunity from suit.

Mohegan Const. art. XIII, § 1; *see* Pet. Br. 3; Pet. App. 4a n.4; *see also* U.S. Br. 1.

Second, the Tribe established a Gaming Disputes Court, which it vested with "[e]xclusive jurisdiction *** over disputes arising out of or in connection with [tribal] [g]aming" or "the actions of The Tribal Gaming Authority." Mohegan Const. art. XIII, § 2; *see* Mohegan Tribal Code § 3-21. Under the Mohegan Constitution, judges of the Gaming Disputes Court must be appointed by the Tribal Council (the Tribe's principal executive and legislative body) from a publicly available list of retired federal judges and Connecticut attorney trial referees. Mohegan Const. art. XIII, § 2.3. They cannot be related to any members of the Tribal Council, and may be removed only for cause. *Id.* §§ 2.3(b), 2.6. Any adverse decision at the trial level may be appealed to a three-judge panel of the Gaming Disputes Court of Appeals. *Id.* § 2.4; Mohegan Tribal Code §§ 3-26, 3-171.

3. As required by the Gaming Compact, the Tribe also adopted a remedial scheme for tort claims against the MTGA that closely mirrors Connecticut's own system for claims against the State. Like Connecticut, the Tribe has waived its sovereign immunity against suits by any person, "wherever located," who alleges that he was injured by the MTGA or by its employees acting within the scope of their authority. Mohegan Tribal Code §§ 3-244, 3-248(a), 3-250(b); *see* Conn. Gen. Stat. Ann. §§ 4-160(c), 4-165(a) (authorizing parallel claims against the State). Plaintiffs must bring such suits in the Gaming Disputes Court. Mohegan Tribal Code § 3-250(b). In adjudicating those suits, the Gaming Disputes Court applies Connecticut tort law, subject to minor modifications. *Id.* §§ 3-52(a), 3-241 to 3-252; *see, e.g.*,

Crenshaw v. *Mohegan Tribal Gaming Auth.*, 11 Am. Tribal Law 94, 98 (Mohegan Gaming Disputes Ct. App. 2011) (applying Connecticut's definition of "negligence"). And the Tribe imposes limitations on damages awards drawn from state law: As in Connecticut, plaintiffs may not recover punitive damages. Mohegan Tribal Code § 3-251(a)(1); *Ware* v. *Connecticut*, 983 A.2d 853, 868 (Conn. App. Ct. 2009). Also as in Connecticut, the Tribe may not pay awards that exceed available funds. Mohegan Tribal Code § 3-251(a); Conn. Gen. Stat. Ann. § 4-162.

Moreover, the Tribe has borrowed Connecticut's restriction on suits against government employees. Like Connecticut, the Tribe does not permit individuals to bring tort suits against its employees for acts taken within their official duties. *Boskello* v. *Mohegan Tribal Gaming Auth.*, 12 Am. Tribal Law 242, 243 (Mohegan Gaming Disputes Ct. 2013) (citing Mohegan Tribal Code § 3-248(a)); *see* Conn. Gen. Stat. Ann. § 4-165(a). Plaintiffs who are injured by MTGA employees must instead sue the MTGA itself, which has assumed liability for its employees' negligent acts. *See* Mohegan Tribal Code § 3-131; *Boskello*, 12 Am. Tribal Law at 244. If, however, a plaintiff brings a suit against an MTGA employee for any act "within the scope of his or her employment," the Tribe must "indemnify" the employee and "provide for [his] defense." Mohegan Tribal Code §§ 4-52, 4-53.

Over the past two decades, the Gaming Disputes Court has adjudicated dozens of tort suits. It has repeatedly issued substantial monetary awards against the MTGA. *See, e.g.*, *Wilson* v. *Mohegan Tribal Gaming Auth.*, 6 Am. Tribal Law 554 (Mohegan Gaming Disputes Ct. 2005) (awarding $499,613

to a plaintiff who suffered injuries after falling from a defective chair); *Bernardo* v. *Mohegan Tribal Gaming Auth.*, 7 Am. Tribal Law 380 (Mohegan Gaming Disputes Ct. 2007) (awarding $151,245 in a slip-and-fall suit). The Gaming Disputes Court even heard another tort suit involving the same car accident at issue here; that case eventually settled. *See Boskello*, 12 Am. Tribal Law at 242; Ryan Blessing, *Mohegan Tribe Settles Lawsuit in 2011 Limo Accident*, Norwich Bulletin (June 26, 2015) (reporting $775,000 settlement).

B. Proceedings Below

In 2011, Petitioners Brian and Michelle Lewis were injured in an automobile accident involving a Tribe-owned vehicle driven by Respondent William Clarke. Pet. App. 2a. Respondent was an employee of the MTGA, and his duties included driving patrons home from the Mohegan Sun Casino. *Id.* At the time of the accident, Respondent was acting within the scope of his employment. *Id.*

Petitioners brought this state-law negligence suit in Connecticut state court. Their complaint alleges that Respondent's negligence caused the collision and Petitioners' resulting injuries. Pet. App. 3a. As originally filed, the complaint named the MTGA and Respondent as co-defendants. *Id.* at 9a. But Petitioners amended that complaint to remove the MTGA as a defendant; they now seek money damages from Respondent "in his individual capacity." *Id.*

Respondent moved to dismiss the suit for lack of subject matter jurisdiction. Pet. App. 3a. He argued that the MTGA is entitled to immunity in state court because it is an arm of the Mohegan Tribe, and that Respondent himself is entitled to immunity because

he was a MTGA employee acting within the scope of his employment when the accident took place. *Id.* at 22a. The trial court denied the motion to dismiss. *Id.* at 36a.

In a unanimous decision, the Supreme Court of Connecticut reversed. Pet. App. 2a.[2] The court determined that "tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority." *Id.* at 10a (quoting *Romanella* v. *Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996)). Relying on *Bassett* v. *Mashantucket Pequot Museum & Research Center, Inc.*, 221 F. Supp. 2d 271 (D. Conn. 2002), the court explained that "[c]laimants may not simply describe their claims against a tribal official as in his 'individual capacity' in order to eliminate tribal immunity." Pet. App. 12a-13a (quoting *Bassett*, 221 F. Supp. 2d at 280). Rather, "a tribal official—even if named in his 'individual capacity'—is only 'stripped' of tribal immunity when he acts 'manifestly or palpably beyond his authority.'" *Id.* at 13a (brackets omitted) (quoting *Bassett*, 221 F. Supp. 2d at 280). Applying that test, the court concluded that Respondent was entitled to "tribal sovereign immunity," and to dismissal of the claims against him, "because the undisputed facts of this case establish that he was an employee of the tribe and was acting within the scope of his employment when the accident occurred." *Id.* at 16a.

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[2] The Connecticut Supreme Court transferred Respondent's appeal directly to its own docket, skipping over the intermediate appellate court, pursuant to Conn. Gen. Stat. Ann. § 51-199(c). Pet. App. 3a.

This Court granted the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The Supreme Court of Connecticut correctly held that Respondent is immune from this suit. Respondent is entitled to that protection under the doctrine of sovereign immunity or, in the alternative, the closely related doctrine of official immunity.

1. Sovereign immunity bars this suit because the Tribe is the real party in interest. It is well-established that sovereign immunity attaches not only where a suit is captioned as a claim against a sovereign, but also where the sovereign is the "real, substantial party in interest." *Ford Motor Co.* v. *Dep't of Treasury*, 323 U.S. 459, 464 (1945), overruled on other grounds by *Lapides* v. *Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2002). Petitioners have sued Respondent for conduct within the scope of his official duties, and every penny that they seek to recover would be drawn from the Tribe's treasury. This is, "in essence," a suit against the Tribe. *Id.*

That is no less true because the Tribe's obligation to pay comes from a legally binding indemnity law. *See* Mohegan Tribal Code § 4-52. A sovereign's "obligat[ion] to bear and pay *** indebtedness" suffices to extend its immunity to a sovereign *instrumentality*. *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 51 (1994). There is no reason why a different result should obtain in the case of an *official* under the sovereign's control. The contrary lower court decisions that Petitioners and the Government cite involved either violations of federal law or illusory promises; they are inapposite here.

2. Alternatively, if Respondent is considered the real party in interest, the common-law doctrine of official immunity bars this suit. For over half a century, federal officials have received absolute immunity from tort liability for acts taken within the scope of their official duties. *Barr* v. *Matteo*, 360 U.S. 564, 573, 575-576 (1959) (opinion of Harlan, J.). The same considerations that justify immunity for federal officials—including protecting "the fearless, vigorous, and effective administration of policies of government," *id.* at 571—apply to tribal officials. Federal common law should therefore grant tribal officials the same immunity.

The Court should not limit that immunity to "discretionary functions," as the Government proposes. The Government gleans such a limit from this Court's decision in *Westfall* v. *Erwin*, 484 U.S. 292 (1988). But Congress "reacted quickly" after that decision "to delete the 'discretionary function' requirement, finding it an unwarranted judicial imposition." *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 426 (1995). The Court should not use its common-law authority to revive the very rule that Congress repudiated. And it especially should not reinvigorate that rule for tribal officials, for whom it would be particularly costly and inequitable.

3. Finally, affording immunity here, whether sovereign or official, would advance important federal policies. It would preserve the sovereign dignity of Indian Tribes, safeguard the Tribes' financial integrity, and aid the effective functioning of tribal government. It would also respect the contractual agreements that many States and Tribes have entered into under IGRA. Moreover, affording immunity to Respondent would not leave Petitioners without

a remedy. Petitioners are entitled to sue the MTGA in tribal court, where the Tribe has waived its sovereign immunity under terms similar to or more generous than those offered by many States. *See* Mohegan Tribal Code §§ 3-248(a), 3-250(b).

ARGUMENT

This case concerns two interrelated forms of immunity that protect tribal officials: sovereign immunity and official immunity.

"Sovereign immunity" refers to the immunity of the government itself—including the immunity of an Indian Tribe. *See Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."). Individual officials may cloak themselves in the government's sovereign immunity if a suit naming them "in fact" seeks relief from the sovereign. *Alden* v. *Maine*, 527 U.S. 706, 756 (1999). That is true, for example, if a plaintiff seeks specific relief involving property or money held by the sovereign. *See, e.g.*, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703 (1949). It is likewise true if a plaintiff sues an official for damages, but the sovereign itself is the "real, substantial party in interest." *Ford Motor Co.* v. *Dep't of Treasury*, 323 U.S. 459, 464 (1945).

"Official immunity," meanwhile, shields government officials from suits for damages paid out of their *own* pockets. Official immunity encompasses several common-law doctrines. One such doctrine shields federal officials, foreign officials, and—as relevant here—tribal officials from state-law civil suits. In *Barr* v. *Matteo*, 360 U.S. 564 (1959), the

Court concluded that federal officials are entitled to an "absolute privilege" from liability for state tort suits based on acts "taken *** within the outer perimeter of [their] line of duty." *Id.* at 573, 575-576 (opinion of Harlan, J.); *see Howard* v. *Lyons*, 360 U.S. 593 (1959) (same). Although the Court retreated from *Barr* decades later, *see Westfall* v. *Erwin*, 484 U.S. 292 (1988), Congress immediately reinstated a broad rule of immunity, covering discretionary and non-discretionary functions alike. *See* Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 (28 U.S.C. § 2679); *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 426 (1995).

Though formally invoked by an individual, official immunity "springs from the same root considerations that generated the doctrine of sovereign immunity." *Scheuer* v. *Rhodes*, 416 U.S. 232, 239 (1974), abrogated on other grounds by *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). Immunity from suit, after all, "is not a badge or emolument of exalted office" but is "designed to aid in the effective functioning of government." *Barr*, 360 U.S. at 572-573. Officials at risk of state tort suits may be "unduly timid in carrying out their official duties"; immunity encourages vigorous public service by freeing them "of the costs of vexatious and often frivolous damages suits." *Westfall*, 484 U.S. at 295.

Lower courts have often blended "sovereign immunity" and "official immunity" when assessing suits against tribal officials in their individual capacities. Most early cases extending immunity to tribal officials conceived of that immunity as an application of *Barr*'s official immunity rule. *See, e.g.*, *Davis* v. *Littell*, 398 F.2d 83, 85 (9th Cir. 1968); *White Moun-*

tain Apache Indian Tribe v. *Shelley*, 480 P.2d 654, 657-658 (Ariz. 1971). Later cases relied on those precedents, but referred to tribal officials' immunity as a form of tribal sovereign immunity. *See, e.g.*, *United States* v. *Oregon*, 657 F.2d 1009, 1012 n.8 (9th Cir. 1981) (citing *Davis* and *White Mountain*); *Diver* v. *Peterson*, 524 N.W.2d 288, 290 (Minn. Ct. App. 1994) (citing *Davis*). The inconsistent nomenclature may reflect the fact that, in the tribal context, the terminology makes little functional difference: Both forms of tribal immunity are defined by federal common law and subject to Congress's "plenary control." *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014); *see also, e.g.*, *Nat'l Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 851-853 (1985); *Cty. of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 233-235 (1985).[3]

The Connecticut Supreme Court's decision here is the latest link in that game of telephone. The court relied, for example, on *Romanella* v. *Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996), *aff'd*, 114 F.3d 15 (2d Cir. 1997) (per curiam), which relied on *Hardin* v. *White Mountain Apache Tribe*, 779 F.2d 476, 478-480 (9th Cir. 1985), which relied on *Davis*, 398 F.2d at 85, which relied on *Barr*. *See* Pet. App. 10a-11a. It also adopted the analysis in *Bassett* v. *Mashantucket Pequot Museum & Research Center, Inc.*, 221 F.

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[3] For States, by contrast, the label matters. Sovereign immunity is constitutionally protected from congressional abrogation, at least with respect to Congress's Article I powers. *See Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44 (1996). Official immunity, however, may be modified by Congress. *See Westfall*, 484 U.S. at 300.

Supp. 2d 271 (D. Conn. 2002). *See* Pet. App. 12a-13a. *Bassett* reasoned that, while "Eleventh Amendment immunity does not extend to suits against a *state* official in his 'individual capacity,' * * * the officer could claim absolute or qualified immunity as a defense." 221 F. Supp. 2d at 280 (emphasis added). But in the *tribal* context, *Bassett* collapsed sovereign and official immunity into one analysis; the question was simply whether the tribal official had acted "beyond his authority." Pet. App. 13a (quoting *Bassett*, 221 F. Supp. 2d at 280); *see also* U.S. Br. 17. The Connecticut Supreme Court's decision thus has its roots in official immunity, at least as much as sovereign immunity.

Regardless of the label it used, the Connecticut Supreme Court arrived at the right outcome. Sovereign immunity bars Petitioners from bringing this suit in state court because the Tribe is the real party in interest: It exercised control over Respondent and is legally obligated to indemnify him for damages based on acts within the scope of his duties. Alternatively, if this Court determines that Respondent is the real party in interest, then official immunity applies. Since *Barr*, that doctrine has granted government officials immunity from state tort liability for acts within the line of duty, including Respondent's acts here. Either way, the result is the same: Petitioners cannot invoke state tort law to sue a tribal official who was doing his job. Just as if Respondent were a federal official or a state official, Petitioners must bring this suit against the Tribe in its own courts.

I. SOVEREIGN IMMUNITY BARS THIS SUIT

Petitioners do not contest that their original complaint, which named the MTGA as a defendant, was barred by sovereign immunity. *See* Pet. Br. 22. Instead, they argue that sovereign immunity became irrelevant when Petitioners relabeled their suit an action against Respondent "in his individual capacity." Pet. Br. 7-9. This Court has never taken that formalistic approach. Rather, it has analyzed whether the sovereign is the real party in interest—that is, whether the defendant is the sovereign's agent and the sovereign will foot the bill. Here, the Tribe (1) authorized Respondent to act on its behalf, and (2) promised by statute to indemnify him for such acts, while substituting itself as the appropriate defendant in its own court system. *See* Mohegan Tribal Code §§ 3-131, 4-52. Given that pair of features, the Tribe is the real party in interest and its sovereign immunity bars Petitioners' suit.

1. This Court has long cautioned that the caption of a lawsuit is not the sole determinant of sovereign immunity. In an ordinary individual-capacity action against a public official, damages are paid from "the official's personal assets," and sovereign immunity does not apply. *Kentucky* v. *Graham*, 473 U.S. 159, 166-167 (1985); *see Hafer* v. *Melo*, 502 U.S. 21, 25 (1991) (explaining that individual-capacity suits "impose individual liability upon a government officer"). But that is not true of all putative individual-capacity suits. To the contrary, the Court has examined "the essential nature and effect of the proceeding" to determine whether "the action is in essence" a suit against the sovereign. *Ford Motor Co.*, 323 U.S. at 464. If it is, then the sovereign "is

the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.*; *see Larson*, 337 U.S. at 687 (holding that a suit "must fail, whether or not the officer might otherwise be suable," if it is, "in effect, a suit against the sovereign").

In damages actions against a sovereign's agent, the sovereign is the real party in interest if it must pay any adverse judgment. *See Ford Motor Co.*, 323 U.S. at 464 (asking whether the suit "is in essence one for the recovery of money from the state"). Petitioners suggest that this rule applies only when a judgment will be formally executed against the sovereign's treasury. *See* Pet. Br. 8. But this Court has not drawn such a bright line. In *Larson*, for example, it explained that sovereign immunity attaches if a judgment against the sovereign's agent might "require action by the sovereign *or disturb* the sovereign's property." 337 U.S. at 687 (emphasis added). The use of the disjunctive and the term "disturb" capture situations in which a sovereign might be liable "in effect" as well. *Id.*; *see also Malone* v. *Bowdoin*, 369 U.S. 643, 648 (1962) (holding that sovereign immunity barred an "action which *in substance and effect* was one against the United States" (emphasis added)).

The Court reiterated its functional approach in *Edelman* v. *Jordan*, 415 U.S. 651 (1974). It explained that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Id.* at 663. That was true even though the plaintiffs had nominally sued state officials, because "[t]he funds to satisfy the award in this case

must *inevitably* come from the general revenues of the State of Illinois." *Id.* at 665 (emphasis added); *see also id.* at 664 ("These funds will *obviously* not be paid out of the pocket of [the official]." (emphasis added)). As a result, any judgment would "resemble[]" a monetary judgment against the sovereign. *Id.* at 665. The analysis, in other words, focused on the practicalities—who would "inevitably" or "obviously" pay—rather than whose name appeared in the caption.

2. This Court has not yet decided "which arrangements between a State and a nominal defendant are sufficient to establish that the State is the real party in interest." *Port Auth. Trans-Hudson Corp.* v. *Feeney*, 495 U.S. 299, 316 n.10 (1990). But in the closely related context of suits against state (or tribal) *instrumentalities*, the Court has held that an entity shares the sovereign's immunity if the sovereign (1) controls that entity and (2) is liable for its debts.

In *Hess* v. *Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), the Court evaluated both factors to determine whether a purported state instrumentality was entitled to share a State's sovereign immunity. It first treated control as a prerequisite, noting that States have "ultimate control of every state-created entity." *Id.* at 47; *see id.* at 60-61 (O'Connor, J., dissenting) (advocating control as the dispositive factor). So the Court focused on financial responsibility and deemed "the vulnerability of the State's purse as the most salient factor." *Id.* at 48. In short, "is the State in fact obligated to bear and pay the resulting indebtedness of the enterprise?" *Id.* at 51. That determination depends on whether the State, *in its own laws*, has assumed responsibility for the

entity's debts. *See id.* at 46 (reasoning that the two controlling States "bear no legal liability for [the corporation's] debts" and that "nothing in the compact or the laws of either State" suggests that it "would pay"); *see also Regents of Univ. of Cal.* v. *Doe*, 519 U.S. 425, 429 n.5 (1997) (explaining that immunity "is a question of federal law" that "can be answered only after considering the provisions of state law that define the agency's character").

Lower courts applying *Hess* have commonly considered the presence or absence of state indemnity laws in determining whether an entity shares a State's sovereign immunity. *See, e.g.*, *Grajales* v. *Puerto Rico Ports Auth.*, 831 F.3d 11, 29 (1st Cir. 2016) (Puerto Rico law did not make the government "liable, as a practical matter," for an adverse judgment against the agency); *Kreipke* v. *Wayne State Univ.*, 807 F.3d 768, 776 (6th Cir. 2015) (Michigan law required any judgment against the university to be paid by the State), petition for cert. pending, No. 15-1419 (filed May 19, 2016); *U.S. ex rel. Oberg* v. *Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 138 (4th Cir. 2014) (Pennsylvania law disavowed state liability for the agency's debts), petition for cert. pending, No. 15-1045 (filed Feb. 16, 2016). Courts have been even more accommodating for tribal arrangements, extending sovereign immunity to entities whose success inures to the Tribe's benefit, even if the Tribe does not formally indemnify them. *See, e.g.*, *Breakthrough Mgmt. Grp.* v. *Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1194-1195 (10th Cir. 2010) (extending sovereign immunity to casino that funded governmental functions); *Allen* v. *Gold Country Casino*, 464 F.3d 1044, 1046-1047 (9th Cir. 2006) (extending sovereign immunity to casino

that promoted tribal economic development); *see also* U.S. Br. at *13, *Inyo Cty.* v. *Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony*, No. 02-281, 2003 WL 252549 (Jan. 23, 2003) (arguing that tribal corporation was entitled to sovereign immunity because "any money judgment against [it] would necessarily deplete what would otherwise be tribal funds").[4]

That functional approach should apply equally to the determination whether a suit against a state (or tribal) *official* is really a suit against the sovereign. The ultimate question in both contexts is the same: Is the sovereign responsible for an adverse judgment against its agent? *Compare Hess*, 513 U.S. at 48 (asking whether "judgments *** must be paid out of [the sovereign's] treasury"), *with Edelman*, 415 U.S. at 663 (asking whether any "liability *** must be paid from public funds"). If control and a statutory obligation to "pay *** indebtedness," *Hess*, 513 U.S.

[4] Lower courts have applied a similar analysis—control plus indemnification—to determine whether government agents are entitled to immunity in the Medicare context. *See, e.g.*, *Pani* v. *Empire Blue Cross Blue Shield*, 152 F.3d 67, 72 (2d Cir. 1998) (intermediary received sovereign immunity because it is "a government agent that acts on behalf of the Medicare Administrator *** and is entitled to indemnification from the United States, which, therefore, is the real party of interest" (brackets and internal quotation marks omitted)); *Pine View Gardens, Inc.* v. *Mut. of Omaha Ins. Co.*, 485 F.2d 1073, 1075 (D.C. Cir. 1973) (intermediary received sovereign immunity because an adverse judgment "would, in effect, be requiring a government fiscal agent to make a payment for which, in turn, the agent would reasonably seek, and justly claim, reimbursement from the Government").

at 51, suffice to answer that question in the affirmative for public entities, then they should suffice for public officials as well. Indeed, Petitioners' "leading treatise" makes just that point. *See* Pet. Br. 9-10 (discussing 5 Fowler V. Harper et al., *Harper, James and Gray on Torts* (3d ed. 2008)). Although the treatise says that a sovereign is "seldom" the real party in interest in a tort suit against a government official, it includes an important caveat: "Except where a public entity by statute may be permitted or required to indemnify the employee if he is held liable." *Harper* § 29.9, at 790 n.3.

Applying the two-pronged functional approach here, the Tribe is the real party in interest. As an initial matter, the control prerequisite is satisfied. Respondent was a tribal employee, was sued for actions that he took at the Tribe's behest, and was driving a Tribe-owned vehicle at the time of the accident. Pet. App. 2a. Petitioners have never asserted that he acted outside the scope of his employment. *See id.* at 3a. The Tribe therefore exercised control over the conduct underlying this suit.

More importantly, the Tribe bears full financial liability for any adverse judgment in this case. In the Mohegan Tribal Code, the Tribe has committed to "indemnify its Officer or Employee from financial loss and expense arising out of any claim, demand, or suit by reason of his or her alleged negligence" if the officer or employee was "acting in the discharge of his or her duties or within the scope of his or her employment." Mohegan Tribal Code § 4-52. And the Tribe has not just indemnified its employees; it has declared that the Tribe itself (or the MTGA) is the appropriate "named defendant" in a tort action. *Id.* § 3-131. Under the "laws of the [Tribe]," *Hess*, 513

U.S. at 46, any damages levied against Respondent "must be paid from public funds." *Edelman*, 415 U.S. at 663.

The combination of the Tribe's control over its officials and its statutory commitment to indemnify them means that the Tribe is the real party in interest and that sovereign immunity bars this suit.

3. Petitioners and the Government object that the Tribe's indemnification law is irrelevant because it is "voluntary." *See* Pet. Br. 24; U.S. Br. 11-12. But indemnification laws concerning a state or tribal instrumentality are equally "voluntary," and they are the *touchstone* of sovereign immunity under *Hess*. Neither Petitioners nor the Government cites a single case from this Court holding that such laws should be ignored here.

Petitioners point only to *Alden* v. *Maine*, 527 U.S. 706. *See* Pet. Br. 24. Yet *Alden* did not say a word about indemnification. It merely described one of the underlying justifications for sovereign immunity—that "[p]rivate suits against nonconsenting States *** may threaten the financial integrity of the States" and interfere "with the will of their citizens." 527 U.S. at 750-751. And so they may. Subjecting a Tribe to monetary damages in a state court, whether formally or functionally, would have the same effect. The State could exercise "a power and a leverage" over the Tribe. *Id.* at 750. And that power would "carr[y] with it substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity" of the Tribe. *Id.* Petitioners' proposed solution—that a Tribe simply decline to indemnify its employees, Pet. Br. 24—is no solution at all. It would similarly defeat "the will of [the Tribe's] citizens,"

Alden, 527 U.S. at 751, by overriding their decisions to encourage public service and to deputize the tribal government to litigate external legal disputes on officials' behalf.

The Government, for its part, cites this Court's decision in *Regents*, 519 U.S. 425. U.S. Br. 12. As its *"cf."* signal suggests, *Regents* does not control. There, the plaintiff argued that when "the *State* [is] indemnified by a third party," it is *stripped* of its sovereign immunity. 519 U.S. at 431 (emphasis added). The Court flatly rejected the argument. It quipped that "if the sovereign State of California should buy insurance to protect itself against potential tort liability to pedestrians stumbling on the steps of the State Capitol, it would not cease to be 'one of the United States.'" *Id.* at 431. But the Court made clear that a State's obligation to pay a judgment remained relevant "[w]hen deciding whether a *state instrumentality* may invoke the State's immunity" in the first place. *Id.* at 429 (emphasis added). After all, "a State's legal liability for judgments * * * [w]as an indicator of the relationship between the State and its creation." *Id.* at 430-431; *see id.* at 429 n.5 (reaffirming that a state instrumentality's entitlement to sovereign immunity depends on the voluntary "provisions of state law that define the agency's character").

That leaves several lower court decisions that have refused to give weight to state indemnification statutes. *See* U.S. Br. 12. Those decisions have raised two additional concerns about federal supremacy and fairness. Yet both concerns are already folded into the real-party-in-interest analysis: An official who violates federal law lacks the imprimatur

of the sovereign, and a sovereign that forecloses all relief lacks any threat to its treasury.

First, lower courts have balked at the prospect that a State might shield its officials from *federal* laws like 42 U.S.C. § 1983. They have accordingly refused to allow States to use indemnification statutes to extend their Eleventh Amendment immunity to officials sued under federal law. *See Duckworth* v. *Franzen*, 780 F.2d 645, 651 (7th Cir. 1985) (opining that "it would be absurd" to allow a State "to put its employees beyond the reach of section 1983" by indemnifying them); *Demery* v. *Kupperman*, 735 F.2d 1139, 1147 (9th Cir. 1984) (refusing to afford States "the power effectively to prevent vindication of federal rights in federal court"). Those decisions are consistent with a real-party-in-interest analysis. A State or Tribe cannot be the real party in interest if an official violates federal law, even if the sovereign has agreed to indemnify the official. That is because actions in violation of federal law are ultra vires, just as actions outside the scope of an official's authority are ultra vires. *Demery*, 735 F.2d at 1146; *see Ex parte Young*, 209 U.S. 123, 159-160 (1908) (explaining that when a state official "comes into conflict with the superior authority of [the federal] Constitution, * * * he is in that case stripped of his official or representative character"); *Scheuer*, 416 U.S. at 237-238 (applying same analysis to state official sued for damages for "depriv[ing] another of a federal right"); *see also Larson*, 337 U.S. at 690. A Tribe's sovereign immunity from *state* liability, or vice versa, presents no such conflict with supreme federal law.

Second, lower courts have worried that, in some circumstances, indemnity could be an illusory offer. Put differently, a State might give with one hand by

promising to indemnify its officials, and take with the other by claiming sovereign immunity. *See Griess* v. *Colorado*, 841 F.2d 1042, 1046 (10th Cir. 1988) (per curiam); *Demery*, 735 F.2d at 1147. Again, though, a real-party-in-interest analysis accounts for that concern. If a sovereign has offered cost-free indemnity, a suit does not truly risk "disturb[ing] the sovereign's property." *Larson*, 337 U.S. at 687. And again, that incongruity is beside the point here. The Tribe has not offered indemnity in name only; it has assumed liability for is officials' negligence in its own courts and has required that it be named as the defendant in their place, putting its treasury at stake. Mohegan Tribal Code §§ 3-131, 3-250.

In sum, the real-party-in-interest analysis comes out differently in this case than in the various lower court cases about indemnification. Here, the Tribe authorized Respondent's actions (and could so authorize, because there was no conflict with superior federal law), and it committed to pay for the legal repercussions of those actions in tribal court (and thus did not make an illusory promise). Under the facts of this case, then, the Tribe is the real party in interest.

4. Finally, as a practical matter, indemnification is not truly "voluntary" for many Tribes, as it is for States. At least until this Court clarifies the scope of their official immunity, *see infra* pp. 26-49, tribal employees are uniquely at risk of liability because they often must engage in off-reservation activity. Tribes, in turn, must indemnify their officials or suffer interference with their public administration.

Simple geography makes the point. Unlike States, Indian reservations may be located in remote areas and spread across non-contiguous parcels of land. *See* Steve E. Dietrich, *Tribal Businesses and the Uncertain Reach of Tribal Sovereign Immunity: A Statutory Solution*, 67 Wash. L. Rev. 113, 131 (1992) (describing Tribes' need to traverse roads that "frequently weave in and out of reservation land"). The Mohegan Tribe, for example, holds several distinct properties, connected by miles of Connecticut roads. *See* Mohegan Tribe, *Plan Showing Trust and Fee Lands of the Mohegan Tribe of Indians of Connecticut* (Dec. 2016), https://goo.gl/qpwQGs. As a result, tribal officials must leave tribal land in order to perform basic functions, from conducting law enforcement to providing emergency and social services to tribal members. In fact, tribal officials may carry out those services pursuant to mutual-aid agreements with Connecticut municipalities, whereby each party commits to render emergency services in the other's jurisdiction. *See* Conn. Dep't of Emergency Servs. & Pub. Prot., *Statewide Fire Rescue Disaster Response Plan* (2015), https://goo.gl/m7saLd (listing Mohegan Tribal Fire Department among participating departments). If the Tribe did not indemnify its officials, it might be forced to forgo the full complement of services incident to self-governance. That is not a dilemma that States face, at least not on the same scale.

Tribes also face unique economic constraints, which require them to engage in more outward-facing activities. Because much of their land is held in trust by the Federal Government and because members have little income, "few tribes have any significant tax base." Catherine T. Struve, *Tribal Immuni-*

ty & Tribal Courts, 36 Ariz. St. L.J. 137, 169 (2004). Tribes' limited territory and tenuous financial position "make it particularly likely that tribal enterprises must engage in external commerce." *Id.* at 169 n.184; *see Bay Mills*, 134 S. Ct. at 2043-2045 (Sotomayor, J., concurring) (describing the "insuperable *** barriers Tribes face in raising revenue through more traditional means"). As this Court has acknowledged, external commercial activities may "provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services." *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 218-219 (1987).

Because leaving the reservation may be a geographic and economic necessity, the Tribe cannot rely on tribal law alone to protect its employees. Connecticut, by contrast, can guarantee immunity to employees within its borders—even, in at least some circumstances, on tribal land. Conn. Gen. Stat. Ann. § 4-165(a); *see Nevada* v. *Hicks*, 533 U.S. 353, 364 (2001). But the Tribe has no such luxury. As a consequence, it "inevitably" must indemnify its employees for off-reservation activity. *Edelman*, 415 U.S. at 655.

II. ALTERNATIVELY, OFFICIAL IMMUNITY BARS THIS SUIT

If the Court concludes that Respondent, rather than the Tribe, is the real party in interest, it should still affirm the Connecticut Supreme Court. In that event, the common-law doctrine of official immunity protects Respondent from state tort liability for actions that he performed within the scope of his official duties.

Petitioners assert that the Court should not consider official immunity because the question presented uses the words "sovereign immunity." Pet. Br. 22 n.2. But Petitioners just took those words from the Connecticut Supreme Court's opinion, and as discussed above, the Connecticut Supreme Court—like most lower courts—used "tribal sovereign immunity" as an umbrella term to encompass both sovereign immunity and official immunity. *See supra* pp. 12-14. The court adopted the reasoning of *Bassett*, a decision that explicitly blended both concepts, Pet. App. 12a-13a (quoting *Bassett*, 221 F. Supp. 2d at 280), and it invoked official-immunity laws to illustrate which actions are "subject to sovereign immunity," *id.* at 14a-15a (citing *Young* v. *City of Mount Ranier*, 238 F.3d 567, 578 (4th Cir. 2001), and Conn. Gen. Stat. Ann. § 4-165).[5] The "precise terms of the question presented" do not compel the Court to ignore official immunity when it is "essential to analysis" of the decision below. *Procunier* v. *Navarette*, 434 U.S. 555, 559 n.6 (1978).

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[5] Even in other contexts, where Connecticut courts draw a distinction between sovereign immunity and official immunity, they treat both defenses the same way procedurally. Both defenses are raised by a motion to dismiss for lack of subject matter jurisdiction and are amenable to an immediate appeal. *See Martin* v. *Brady*, 802 A.2d 814, 817 (Conn. 2002) (official immunity "implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss" (internal quotation marks omitted)); *Manifold* v. *Ragaglia*, 891 A.2d 106, 113-114 (Conn. App. Ct. 2006) (denial of official immunity "is an immediately appealable final judgment"); Pet. App. 4a-5a.

At the certiorari stage, Petitioners recognized as much. They devoted several pages of their petition to arguing that "[t]he Connecticut Supreme Court's error was not simply a matter of attaching the wrong label" to "official immunit[y]." Pet. 19; *see id.* at 17-20 (discussing *Westfall* and other official-immunity precedents). Respondent countered that "the decision below is consistent with the limits on the immunity of government officials" and pointed to the Westfall Act and the analogous Connecticut statute for support. Br. in Opp. 1, 24-25. Despite their footnote of protest, Petitioners have continued this argument in their merits brief, where they again spend pages trying to show that official immunity would not bar this suit. Pet. Br. 13-17.

The Government agrees that official immunity is in the question presented, judging by the last half of its brief. *See* U.S. Br. 18-33. The parties are fully apprised of the issue. And by failing to address this doctrine, the Court would potentially strip away a protection that tribal officials have relied on for decades without considering a central legal basis on which that protection rests. Nothing requires the Court to take that approach. It should address whether Respondent is entitled to the substance of the immunity that the Connecticut Supreme Court recognized.

A. The Federal Common Law Extends Official Immunity To Tribal Officials

Official immunity is "a creature of the common law." *Scheuer*, 416 U.S. at 241. The Court began developing official immunity doctrines centuries ago to "promote the effective functioning of the Federal Government." *Howard*, 360 U.S. at 597; *see Spal-*

ding v. *Vilas*, 161 U.S. 483, 494 (1896); *Scheuer*, 416 U.S. at 241-242. It reasoned that if public officials were subject to personal liability for their official acts, they would be "unduly timid in carrying out their official duties," *Westfall*, 484 U.S. at 295; "time and energies which would otherwise be devoted to governmental service" would be consumed defending harassing or frivolous lawsuits, *Barr*, 360 U.S. at 571; and "the fearless, vigorous, and effective administration of policies of government" would be "inhibit[ed]," *id.*

This Court has recognized a variety of federal common-law immunity rules to vindicate those goals. It has held that judges, prosecutors, and the President are absolutely immune from personal-capacity suits concerning some or all of their official acts. *See Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982); *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1872). Officials at every level of government receive qualified immunity from civil liability for violations of federal law. *See Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987); *Scheuer*, 416 U.S. 232. And, most pertinent here, federal officials are entitled to immunity from state-law tort liability. *See Barr*, 360 U.S. at 571.

As the Government explains, "the same concerns that justified recognition of official immunity for federal employees justify affording official immunity to tribal employees as a matter of federal common law." U.S. Br. 26. Tribes, no less than other governments, require "fearless, vigorous, and effective administration." *Barr*, 360 U.S. at 571. And the administration of a Tribe, like that of any other government, would be impaired if its officials were subject to pervasive personal liability for their official acts. *See id.* Because the Federal Government

has a unique interest in protecting "strong tribal governments," 25 U.S.C. § 4301(a)(6), federal common law should grant tribal officials the same immunity it extends to other government officials. U.S. Br. 26 & n.7; *cf. Nat'l Farmers Union Ins.*, 471 U.S. at 856; *Bay Mills*, 134 S. Ct. at 2030-2031; *Oneida Indian Nation*, 470 U.S. at 233-235; *see generally Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 505 (1988).

Petitioners disagree, arguing in a footnote that "the principles of federal supremacy that support official immunity for federal employees are not applicable to tribal employees." Pet. Br. 22-23 n.2. But federal employees' immunity from tort liability is not based on "principles of federal supremacy"; it derives from the interest in "promot[ing] the effective functioning of the Federal Government." *Howard*, 360 U.S. at 597. The Federal Government has a parallel interest in promoting the effective functioning of tribal governments. *See Nat'l Farmers Union Ins.*, 471 U.S. at 856. The same immunity should protect that interest, too.

B. Official Immunity Protects Tribal Officials From State-Law Tort Suits Concerning Acts Within The Scope Of Their Duties

The only real dispute is what the scope of that immunity should be. The Government asks this Court to subject tribal officials to the rule of *Westfall* v. *Erwin*, which held that federal officials' immunity was limited to their "discretionary functions." U.S. Br. 27. But *Westfall* was an outlier that Congress quickly repudiated. For three decades prior to that decision, federal courts had granted officials *absolute*

immunity from tort liability concerning their official acts. And when *Westfall* "eroded" that immunity, Westfall Act § 2(a)(3), Congress "reacted quickly to delete the discretionary function requirement, finding it an unwarranted judicial imposition." *Lamagno*, 515 U.S. at 426. The Court should not use its common-law authority to impose *Westfall*'s discredited rule on tribal officials, especially after *Westfall* itself sought "guidance" from Congress, 484 U.S. at 300.

1. Congress enacted the Westfall Act to restore the rule of absolute immunity that prevailed under *Barr* v. *Matteo*

a. First, a brief history: Prior to 1959, federal officials received limited immunity from state-law tort liability. Although the Court had long held that judicial officers and cabinet-level officials were immune from liability for certain state-law torts, *see Spalding*, 161 U.S. at 494; *Bradley*, 80 U.S. (13 Wall.) 335, it remained unclear whether that immunity protected lower-ranking employees or covered the full range of tort claims. As late as 1942, when Congress was drafting the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 *et seq.*, disgruntled individuals could and "constantly" did sue federal employees in their personal capacity to challenge actions with which they were unhappy. *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary*, 77th Cong. 25 (1942) (statement of Assistant Att'y Gen. Francis Shea).

In *Barr* v. *Matteo*, the Court clarified the scope of official immunity. It confirmed that immunity from tort liability extended to *all* federal employees, not just "officers of cabinet rank." 360 U.S. at 572-573.

And it stated that the immunity provided an "absolute privilege" against any tort suits concerning acts "taken *** within the outer perimeter of [the employee's] line of duty." *Id.* at 574-575 (opinion of Harlan, J.); *see id.* at 577-578 (Black, J., concurring) (agreeing that immunity attached because the challenged act "was neither unauthorized nor plainly beyond the scope of [the employee's] official business"); *see also Howard*, 360 U.S. at 597 (similar).

For "three decades" following *Barr*, the "great weight of authority" held that "federal employees' actions were *absolutely* protected from common law tort liability" so long as they were "within the outer perimeter of the employee's official duties." *Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 100th Cong. 62 (1988) (*Westfall Act Hearing*) (statement of Robert L. Willmore, Deputy Assistant Att'y Gen., Civil Div., U.S. Dep't of Justice) (emphasis added). Courts granted immunity regardless of the nature of the tort claim, and regardless of whether the employee's action entailed meaningful discretion. *Id.*; *see* U.S. Br. at 10, *Westfall*, *supra* (No. 86-714) (similar). Although a few courts construed *Barr* more narrowly, that was a sufficiently minority view that by 1988, the Department of Justice reported that employees were only "occasionally" sued in their personal capacity, and individual liability "[r]arely" attached. *Westfall Act Hearing* 64-65; *see* H.R. Rep. No. 100-700, at 2 (1988) (reporting that "[u]ntil the *Westfall* decision, nearly all actions against Federal employees in their personal capacity were unsuccessful").

The Government has evidently forgotten all that. It now claims that prior to 1988, employees did not receive tort immunity for non-discretionary conduct unless a specific statute so provided. U.S. Br. 23-25, 28. That description of the law would have been unrecognizable to the Department of Justice that urged passage of the Westfall Act and to the Congress that enacted it. *See Westfall Act Hearing* 64-65; H.R. Rep. No. 100-700, at 2; *see also Osborn* v. *Haley*, 549 U.S. 225, 257 (2007) (Breyer, J., concurring in part and dissenting in part) (stating that until 1988 "many thought" that federal employees received "an immunity that applied to nondiscretionary, as well as discretionary, actions that fell 'within the scope' of the employee's 'office or employment'" (citation omitted)). It is also irreconcilable with the case law after *Barr*, which regularly granted employees immunity for non-discretionary acts. *See, e.g.*, *Gen. Elec. Co.* v. *United States*, 813 F.2d 1273, 1276-1277 & n.3 (4th Cir. 1987) (per curiam); *Poolman* v. *Nelson*, 802 F.2d 304, 307-308 (8th Cir. 1986) (citing cases); *Lojuk* v. *Johnson*, 770 F.2d 619, 626-627 (7th Cir. 1985); *see also* U.S. Br. at 11 & n.6, *Westfall*, *supra* (No. 86-714) (noting that even those courts of appeals that required discretion often "reached almost the same result by concluding that the authority to exercise very limited discretion is sufficient").

The statutes that the Government and Petitioners cite only confirm the point. *See* U.S. Br. 23-25; Pet. Br. 15-16. The FTCA was enacted more than a decade before *Barr*. Act of Aug. 2, 1946, Tit. IV, Pub. L. No. 79-601, 60 Stat. 812, 842-847. The Federal Drivers Act was proposed and debated before *Barr*, as well; although Congress enacted the statute

shortly after that decision, there is no indication that Congress was aware of the case or recognized its import. *See* H.R. Rep. No. 87-297, at 2 (1961); Pub. L. No. 87-258, 75 Stat. 539 (1961). The remaining statutes appear to have been efforts to *correct* the errors of outlier courts that had denied official immunity for non-discretionary acts. For instance, in 1976 Congress enacted 10 U.S.C. § 1089 to overrule the D.C. Circuit's decision in *Henderson* v. *Bluemink*, 511 F.2d 399 (D.C. Cir. 1974), which had denied immunity to health-care personnel for non-discretionary conduct. *See* S. Rep. No. 94-1264, at 3-4 (1976); U.S. Br. 25. As even the D.C. Circuit acknowledged, its decision departed from two other circuits that had granted immunity in materially identical circumstances. *See Henderson*, 511 F.2d at 403; *see also* S. Rep. No. 94-1264, at 4 (explaining that "[p]rior to 1974," health-care personnel often received tort immunity).

b. The law did change—briefly—in 1988. That year, in *Westfall* v. *Erwin*, the Court sided with the minority of lower courts and held that employees were entitled to immunity from tort liability only for acts that involved a meaningful degree of discretion. 484 U.S. at 298. As the Court explained, it believed that "the central purpose of official immunity, promoting effective government, would not be furthered by shielding an official from state-law tort liability" for non-discretionary conduct. *Id.* at 296. It reasoned that "[w]hen an official's conduct is not the product of independent judgment, the threat of liability cannot detrimentally inhibit that conduct"; "[i]t is only when officials exercise decisionmaking discretion that potential liability may shackle 'the fearless, vigorous, and effective administration of

policies of government.'" *Id.* at 296-297 (quoting *Barr*, 360 U.S. at 571).

The Court added an important caveat: "We are also of the view, however, that Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context." *Id.* at 300. Accordingly, it said, "[l]egislated standards governing the immunity of federal employees involved in state-law tort actions would be useful." *Id.*

c. Congress "reacted quickly." *Lamagno*, 515 U.S. at 426. In a hearing three months after the decision, representatives of the Department of Justice and federal employee organizations informed Congress that *Westfall* had significantly curtailed the absolute immunity employees had enjoyed since *Barr*. *See Westfall Act Hearing* 61-62; *see also id.* at 33, 176, 190-191, 243; H.R. Rep. No. 100-700, at 2. Those witnesses uniformly rejected the Court's judgment that the goal of "promoting effective government[] would not be furthered" by such immunity. *Westfall*, 484 U.S. at 296. As the Department of Justice explained, stripping employees of tort immunity for non-discretionary functions would subject them to "bankrupting liability simply for engaging in [their] daily responsibility," cause a "devastating" effect on the "morale o[f] the Federal workforce," render it "increasingly difficult to attract the brightest and best candidates into the Federal service," and "make it far more difficult for Federal agencies to accomplish their missions." *Westfall Act Hearing* 57-58; *see*

H.R. Rep. No. 100-700, at 3 (quoting extensively from this testimony).[6]

In November 1988, Congress enacted the Westfall Act. It found that "Federal employees for many years have been protected from personal common law tort liability by a broad based immunity," but that "Westfall v. Erwin *** seriously eroded" that immunity. Westfall Act § 2(a)(3)-(4). It also found that "[t]his erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation," which would "seriously undermine the morale

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[6] *See also Westfall Act Hearing* 33 (statement of Rep. Frank Wolf) (warning that "[t]he mere threat of legal action against Federal employees could leave workers intimidated in their performance of official duties" and "seriously undermine the functions and morale of many Federal agencies"); *id.* at 45 (Letter from G. Jerry Shaw, Gen. Counsel, Sr. Execs. Ass'n) (contending that "[o]nce employees become aware of the potential personal liability" under *Westfall*, "it is only logical that the government would suffer a loss of productivity and a diminished enthusiasm to take necessary actions"); *id.* at 180-181 (statement of Lois G. Williams, Dir. of Litig., Nat'l Treasury Emps. Union) (calling the decision "disastrous for *** efficient functioning of government"); *id.* at 191 (statement of Michael E. Minahan, Pres., Fed. Managers Ass'n) (stating that "[t]he risk of personal liability and the climate of uncertainty created by *Westfall* is counterproductive to the maintenance of a dynamic and competent workforce"); *id.* at 274 (Letter from Charles R. Gillum, Chairman, President's Council on Integrity & Efficiency) (predicting that the decision "will have a devastating impact on law enforcement, investigation and audit activities").

and well being of Federal employees" and "impede the ability of agencies to carry out their missions." *Id.* § 2(a)(5)-(6). Pointing to the Court's plea for guidance, the Act noted that "the Supreme Court indicated that * * * legislative consideration of this matter would be useful." *Id.* § 2(a)(7).

Responding to that invitation, the Act amended the FTCA "to return Federal employees to the status they held prior to the *Westfall* decision." H.R. Rep. No. 100-700, at 4; *see Lamagno*, 515 U.S. at 426. It added a provision stating that employees could not be sued for any "negligent or wrongful act or omission * * * within the scope of [their] office or employment." Westfall Act § 5 (28 U.S.C. § 2679(b)). As was the case before *Westfall*, only the Government itself was the proper defendant in a suit concerning such conduct. *Id.*; *see id.* § 2(a)(2).

2. The rule that prevailed under *Barr* is the appropriate common-law rule of official immunity

The upshot of this history is unmistakable. In enacting the Westfall Act, Congress rejected *Westfall* root and branch, explaining that its premise was incorrect and that its consequences would be disastrous. *See Lamagno*, 515 U.S. at 426 (Congress "delete[d] [*Westfall*'s] 'discretionary function' requirement, finding it an unwarranted judicial imposition"); *Osborn*, 549 U.S. at 257 (Breyer, J., concurring in part and dissenting in part) (Congress sought to "overturn [*Westfall*'s] holding" and "*maintain* the scope of pre-*Westfall* immunity *minus Westfall*'s *'discretionary function' limitation*" (emphasis in original)). That judgment is entitled to this Court's respect.

a. Several reasons compel that conclusion. First, the *Westfall* Court expressly requested Congress's input on the proper official-immunity rule, and Congress answered. In *Westfall*, the Court asked Congress to provide "guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context." 484 U.S. at 300. Congress responded with its "legislative consideration of this matter," Westfall Act § 2(a)(7), making abundantly clear that, in its judgment, absolute immunity *was* warranted in any "context" involving non-discretionary acts. The Court has often noted the critical importance of respecting the dialogue between the branches by listening to the instructions Congress gives in response to judicial decisions. *See Boumediene* v. *Bush*, 553 U.S. 723, 738 (2008) (stating that "[i]f th[e] ongoing dialogue between and among the branches of Government is to be respected, we cannot ignore that [a statute] was a direct response to [the Court's] holding"); *United States* v. *Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1852 (2012) (Kennedy, J., dissenting) ("[I]nstructive exchanges [between the branches] would be foreclosed by an insistence on adhering to earlier interpretations of a statute even in light of new, relevant statutory amendments."). This is as clear a case of that dialogue as any.

Second, Congress's guidance in this context ought to carry particular weight because it stems from Congress's disagreement with the *empirical* assessment on which the Court rested its holding. In *Westfall*, the Court made the predictive judgment that granting officials immunity for non-discretionary acts would not "promot[e] effective government" because "[i]t is only when officials

exercise decisionmaking discretion that potential liability may shackle 'the fearless, vigorous, and effective administration of policies of government.'" 484 U.S. at 296-297 (quoting *Barr*, 360 U.S. at 571). After holding extensive hearings and spending months considering the issue, Congress disagreed: Limiting immunity would create several problems that the Court had overlooked, including causing employees to behave overcautiously, *Westfall Act Hearing* 57-58; deterring "the brightest and best candidates" from joining federal employment, *id.*; and "seriously undermin[ing] [employees'] morale and well being"—problems that, taken together, *would* "impede the ability of agencies to carry out their missions," Westfall Act § 2(a)(6).

As *Westfall* rightly noted, "highly empirical" judgments are matters that Congress is paradigmatically "in the best position" to handle. 484 U.S. at 300. And judgments about the administration of a government workforce are ones in which Congress and the Executive Branch are especially expert. The Court did not have the benefit of expert guidance when it decided *Westfall*. But Congress did, and it found that the Court had erred.

Third, the Court must pay close attention to the policy judgments embodied in the Westfall Act because official immunity is a doctrine of federal common law. As the Court has explained many times, federal common law serves to "fill the interstices of federal legislation," *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979), and to effectuate the "policy choices" that federal statutes "embody," *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991). Accordingly, "[i]f there is a federal statute dealing with the general subject, it is a prime

repository of federal policy and a starting point for federal common law." *Wallis* v. *Pan. Am. Petro. Corp.*, 384 U.S. 63, 69 (1966); *see Boyle*, 487 U.S. at 513; *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 457 (1942); *Deitrick* v. *Greaney*, 309 U.S. 190, 200-201 (1940).

The Court has repeatedly made this point in the context of official immunity. It explained in *Nixon* v. *Fitzgerald* that "decisions concerning the immunity of government officials from civil damages liability have been guided by * * * federal statutes." 457 U.S. at 747. And in *Westfall* itself, the Court said that the scope of official immunity "is a matter of federal law, 'to be formulated by the courts *in the absence of legislative action* by Congress.'" 484 U.S. at 295 (emphasis added) (quoting *Howard*, 360 U.S. at 597).

Here, Congress has acted, and it gave clear and unequivocal guidance that *Westfall* was wrong. The common law of official immunity should reflect that guidance.

b. The Government has no response to any of this. It asserts that the Westfall Act "does not alter the scope of" common-law immunity. U.S. Br. 28. But it offers nothing in support of this *ipse dixit* except a stringcite of lower-court cases applying the *Westfall* rule to federal contractors and other non-governmental entities. As the Court has repeatedly recognized, however, the rationales for official immunity often do not extend with full force to private contractors. *See Richardson* v. *McKnight*, 521 U.S. 399, 409-412 (1997) (describing "certain important differences that, from an immunity perspective, are critical"); *Filarsky* v. *Delia*, 132 S. Ct. 1657, 1670 (2012) (Sotomayor, J., concurring) (noting that "such

cases should be decided as they arise, as is our longstanding practice in the field of immunity law"). More to the point, Congress has said the same thing: It expressly excluded "any contractor with the United States" from the protection of the Westfall Act. 28 U.S.C. § 2671. That lower courts have not provided contractors the protection Congress expressly denied them says nothing about what the rule should be for *government* employees.

The Government also says that the common law should "reflect[] the balance recognized by this Court in its *Westfall* decision between the benefits and costs of immunity." U.S. Br. 28. But why? The Court invited Congress to give it guidance on that "complex and often highly empirical inquiry" nearly three decades ago, *Westfall*, 484 U.S. at 300, and Congress informed the Court that it had made a mistake. Indeed, the Government *itself* vehemently argued that the balance struck by the Court in *Westfall* was in error, and would have a "devastating" effect on its workforce. *Westfall Act Hearing* 57-58. The Government never explains why tribal officials should be subject to that balance from which it worked so hard to free its own employees.

3. It would be particularly inappropriate to subject tribal officials to the *Westfall* rule

That analysis is sufficient to resolve the case. As the Government agrees, tribal officials should benefit from the same common-law rule of official immunity that federal officials enjoy. U.S. Br. 6, 26. And that common-law rule is, for the reasons just discussed, the rule that prevailed under *Barr*. But several

additional considerations make it particularly inappropriate to apply the *Westfall* rule to tribal officials.

a. For one thing, the concerns that led Congress to enact the Westfall Act apply with special force to tribal officials. As noted above, Tribes face unique geographic and economic challenges. Tribal lands are often noncontiguous and remote, requiring tribal employees to travel through States on a regular basis. And Tribes are heavily reliant on outward-facing commercial activities to support tribal governments and provide for their members. *See supra* pp. 24-26.

As a result, tribal employees—and particularly "lower-level employees" like Respondent, on whom Congress thought the *Westfall* rule would have its "most severe impact," H.R. Rep. No. 100-700, at 3—often must expose themselves to state tort liability as a necessary incident of their jobs. Drivers, law enforcement officers, emergency workers, and many other tribal officials must regularly enter States and engage in activities for which they face the risk of tort claims. That risk would inevitably "undermine the morale and well being of [tribal] employees," Westfall Act § 2(a)(6), and create an air of "timid[ity]" and "fear[]" that the Court has long recognized is not conducive to effective government, *Westfall*, 484 U.S. at 295. Those costs would make it more difficult—and expensive—for Tribes to attract "the brightest and best candidates" to enter public service. *Westfall Act Hearing* 58. Indeed, as Congress recognized in 1961, they would make it particularly difficult to attract and retain capable drivers. *See* H.R. Rep. No. 87-297, at 3 (explaining that denying official immunity to government drivers "has an adverse effect on the efficiency and morale of

those employees" and "hardly aids in attracting and holding the responsible sort of employee required for such work"). Those are costs that no government should be required to bear, and they make the "balance" struck in *Westfall* all the more one-sided for Tribes.

b. Tribes' unique sovereign status also cuts against application of the *Westfall* rule. As the Government acknowledges, federal law has long granted officials of foreign sovereigns "immunity from suits for acts taken in an official capacity, not only for discretionary acts." U.S. Br. 22 n.5 (citing, *inter alia*, *Jones* v. *LeTombe*, 3 U.S. (3 Dall.) 384, 385 (1798)); *see Samantar* v. *Yousuf*, 560 U.S. 305, 320 (2010) (explaining that foreign official immunity is "governed by the common law"). Federal courts continue to apply that absolute immunity rule as a doctrine of federal common law. *See Samantar*, 560 U.S. at 322 n.17; *Yousuf* v. *Samantar*, 699 F.3d 763, 775 (4th Cir. 2012); *Matar* v. *Dichter*, 563 F.3d 9, 14 (2d Cir. 2009).

It would be deeply anomalous if federal law treated tribal officials less favorably than "foreign visitors in American courts." *Bay Mills*, 134 S. Ct. at 2041 (Sotomayor, J., concurring). Although important differences exist between Tribes and foreign sovereigns, *see id.* at 2040-2041, the Court has often drawn on the immunity rules applicable to foreign sovereigns in determining what immunity Tribes should receive. *See C&L Enters., Inc.* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 421 n.3 (2001) (citing the rule governing "waivers of immunity by foreign sovereigns" in assessing the scope of tribal waiver); *Kiowa Tribe of Okla.* v. *Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998) (deeming

"the problems of sovereign immunity for foreign countries" "instructive" in determining the scope of tribal sovereign immunity); *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (explaining that Tribes should be "accorded the same status as foreign sovereigns" when suing States).

That practice reflects the fact that Tribes are "domestic dependent nations" and "separate sovereigns pre-existing the Constitution," who "retain their historic sovereign authority" unless Congress abrogates it. *Bay Mills*, 134 S. Ct. at 2030 (internal quotation marks omitted). Therefore, unless Congress says otherwise, tribal officials at least retain the immunity from suit that they would have possessed as officials of independent sovereigns. That immunity is the rule that Congress codified in the Westfall Act.

The Government objects to this line of reasoning on the ground that the "principles of customary international law" and "foreign relations" considerations that underlie the doctrine of foreign official immunity do not apply to tribal officials. U.S. Br. 23 n.5. But that argument simply ignores the Court's repeated admonition that Tribes once *were* "separate sovereigns"—to whom these considerations unquestionably *were* applicable—and that, unlike States, they did not surrender their sovereign rights in a Convention to which they were not parties. *Bay Mills*, 134 S. Ct. at 2030; *see Coeur d'Alene*, 521 U.S. at 268.

Petitioners, for their part, scoff at the notion that a tribal employee would be "treated as somehow akin to a foreign ambassador. Pet. Br. 2. But that is not what Respondent asks. Foreign *ambassadors*, unlike

ordinary foreign officials, are entitled to a near-absolute immunity from "civil process in the receiving state" that extends beyond their official acts. 1 Restatement (Third) of Foreign Relations Law § 464(2) at 458 (1986); *see* U.S. Br. 22 n.5. All Respondent asks is that he be treated the same as a foreign driver—or, for that matter, a federal one—and receive immunity from state tort liability when doing his job.

c. Subjecting a tribal official like Respondent to the *Westfall* rule would also be profoundly inequitable. Consider what the outcome of this suit would have been if Respondent had been driving a car on behalf of any other government. If he had been a federal employee, federal law would have given him an absolute shield of immunity. So too if he had been a foreign official. And if Respondent had worked for Connecticut, state law would have immunized him fully. *See* Conn. Gen. Stat. Ann. § 4-165(a).

Indeed, Respondent would have been entitled to absolute immunity even if he were an official of *another State*. That is because, as this Court held just last Term in *Franchise Tax Board of California* v. *Hyatt*, 136 S. Ct. 1277 (2016), the Full Faith and Credit Clause generally bars a State from declining to observe another State's immunity rules if they are no more restrictive than its own. *Id.* at 1282-1283; *see* U.S. Const. art. IV, § 1 ("Full faith and credit shall be given in each state to the public acts * * * of every other state."). Both Connecticut and the Tribe grant their public officials absolute immunity from tort suits based on acts within the scope of their duties. Conn. Gen. Stat. Ann. § 4-165(a); *Boskello* v. *Mohegan Tribal Gaming Auth.*, 12 Am. Tribal Law 242, 243 (Mohegan Gaming Disputes Ct. 2013)

(citing Mohegan Tribal Code § 3-248(a)). Under *Hyatt*, then, a state official in Respondent's shoes would have been entitled to the absolute immunity Connecticut gives its own officials.

Petitioners thus seek to impose on Respondent a uniquely disfavored status—one unlike that of virtually any other government official in the United States. This Court often takes considerations of fairness and uniformity into account when crafting common-law rules. *See, e.g., Int'l Bhd. of Elec. Workers, AFL-CIO* v. *Hechler*, 481 U.S. 851, 857-858 (1987); *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 486-487 (1981). Here, those considerations support extending to Respondent the full immunity that nearly every other government official in his position would enjoy.

d. The Government does not make any compelling argument to the contrary. It first contends that Congress "coupled" the official immunity provided in the Westfall Act with a waiver of sovereign immunity, "so that injured plaintiffs may bring tort suits arising out of those employees' actions against the United States itself." U.S. Br. 29. Because Congress has not required Tribes to do the same, the Government reasons, there is a possibility that "bar[ring] all state-law tort suits against tribal employees" would deny tort plaintiffs any "avenue for relief," a result the Government thinks that Congress did not intend. *Id.*

That argument suffers from several problems. The first is its premise. As this Court squarely held in *United States* v. *Smith*, 499 U.S. 160 (1991), the Westfall Act "immunizes Government employees from suit *even when* an FTCA exception precludes

recovery against the Government." *Id.* at 165 (emphasis added). That is not an infrequent occurrence: As the Government well knows, the FTCA contains a lengthy list of exceptions to its waiver of sovereign immunity, including claims arising out of discretionary functions, 28 U.S.C. § 2680(a), intentional torts, *id.* § 2680(h), and overseas conduct, *id.* § 2680(k). Thus, the Westfall Act does not ensure that persons injured by government employees may bring tort suits against the United States, as the Government claims. It often forecloses relief entirely, but the grant of official immunity applies regardless.

The Government's concern that Tribes will deny plaintiffs any avenue of relief is also unfounded. As the Government concedes, the Mohegan Tribe has waived its sovereign immunity against off-reservation torts by its employees. U.S. Br. 31; *see* Mohegan Tribal Code §§ 3-244, 3-248(a), 3-250(b). That is not a coincidence. In negotiating compacts with Tribes, States are typically in a position to ask that Tribes create a system of adjudicating off-reservation torts, and Tribes typically agree. *See Bay Mills*, 134 S. Ct. at 2035. Although Congress has not *required* Tribes to offer an alternative avenue of relief, in practice one often exists.

Of course, it is theoretically possible that a Tribe could attempt to deny plaintiffs any avenue of relief. But as the Court made plain in *Bay Mills*, that speculative possibility is no justification for the Court to withhold immunity wholesale. Indeed, *Bay Mills* posed an almost identical concern: By upholding Tribes' sovereign immunity for off-reservation commercial conduct, the Court observed, it was possible that it would leave "a tort victim, or other plaintiff who has not chosen to deal with a tribe,"

with "no alternative way to obtain relief for off-reservation commercial conduct." *Id.* at 2036 n.8. But that did not sway the Court. It thought it sufficient that the plaintiff before it had "many alternative remedies," and there was thus no "need [to] consider whether the situation would be different if no alternative remedies were available." *Id.* So too here. The plaintiffs have a viable and fair "alternative remed[y]" in tribal court. As in *Bay Mills*, the Court can leave for another day the question whether a tribal official's immunity should be curtailed where no such remedy exists.

As a second argument, the Government asks the Court to draw a negative inference from the fact that Congress has granted tribal officials absolute immunity in certain circumstances. U.S. Br. 29-30. That inference is as attenuated as they come. The provisions the Government cites simply make clear that when tribal officials act *on behalf of the Federal Government*, only the United States is liable for their actions. *See* Department of the Interior and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-512, Tit. III, § 314, 104 Stat. 1959 (tribal officials performing contracts or agreements for Federal Government); 25 U.S.C. § 2804(a), (f) (federal, tribal, state, or other government agency aiding in federal law enforcement); *id.* § 5321(d) (tribal officials carrying out federal contracts). When Congress drafted those provisions, it had no reason to address what immunity tribal officials should receive when they act on behalf of a Tribe. There is thus no reason to infer that Congress intended to curtail that immunity.

And that is all the Government offers. Perhaps it recognizes that there is little to be said for subjecting

tribal officials to a rule it vigorously urged this Court not to adopt, *see* U.S. Br., *Westfall*, *supra* (No. 86-714), and immediately, and successfully, pressed Congress to overturn, *see Westfall Act Hearings* 57-58. Indeed, it was not long ago that the Government told the Court that "[t]he scope of federal immunity available to * * * tribal officers" should be "informed" by the immunity federal officers receive under the Westfall Act, U.S. Br. at 21 & n.14, *Hicks*, *supra* (No. 99-1994), a position the Government struggles to reconcile with its current view, U.S. Br. 30-31 n.9.

The Government had it right the first time. The Court can, and should, follow Congress's clear "guidance," decline to revive the *Westfall* rule, and hold that federal law grants tribal officials the same absolute immunity from state tort liability that it has given federal officials for more than half a century.[7]

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[7] If, however, this Court concludes that *Westfall* provides the applicable official immunity rule, it should allow the Connecticut courts to consider in the first instance whether Respondent's duties entailed sufficient discretion to satisfy it. *See* U.S. Br. 33. As the Government acknowledges, courts have concluded that driving may in some circumstances entail meaningful discretion. *See, e.g.*, *McBride* v. *Bennett*, 764 S.E.2d 44, 47 (Va. 2014). The Connecticut courts should also be permitted to determine whether Respondent is entitled to official immunity under federal or state doctrines of comity analogous to the constitutional rule that this Court recognized in *Hyatt*. *See supra* pp. 45-46; *cf. Nat'l Farmers Union Ins.*, 471 U.S. at 853-857; U.S. Br. 31-32.

III. FEDERAL POLICIES SUPPORT RATHER THAN UNDERCUT THE RECOGNITION OF IMMUNITY

Petitioners conclude their brief with an appeal to policy. Pet. Br. 23-29. But they discount the need for immunity—whether sovereign or official—and vastly overstate its costs.

1. For starters, recognizing immunity in this case would serve several important purposes. As already discussed, immunity would preserve "the financial integrity" of a Tribe, *Alden*, 527 U.S. at 750, by protecting the Tribe from crippling liability outside its courts and beyond its control. *See supra* pp. 15-26. And with respect to tribal officials, it would "aid in the effective functioning of government." *Barr*, 360 U.S. at 573; *see supra* pp. 26-49.

The recognition of immunity would also advance important comity and dignity principles. The Federal Government has taken an unequivocal stance on tribal sovereignty and dignity. Congress has codified a special federal "obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination, and economic self-sufficiency among Indian tribes." 25 U.S.C. § 4301(a)(6). And it has specifically blessed tribal courts, declaring that they are "appropriate forums for the adjudication of disputes affecting personal and property rights." *Id.* § 3601(6). Immunity rules that create incentives for active tribal governments with robust tribal courts thus reflect the Federal Government's "policy of supporting tribal self-government and self-determination." *Nat'l Farmers Union Ins.*, 471 U.S. at 856.

At the same time, Tribes stand in a unique position vis-à-vis state court systems. Whereas States have agreed to mutual waivers of immunity, "it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties." *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 782 (1991). States and Tribes, in other words, have not constitutionally committed to a cooperative governmental scheme—the same scheme that allows one State to hale another State or (sometimes) its officials into court. *See id.*; *see also Franchise Tax Bd. of Cal.* v. *Hyatt*, 538 U.S. 488 (2003). Federal law thus draws sharper boundaries between the two coordinate sovereigns. *Cf. Hicks*, 533 U.S. at 365 (in the reverse context, warning that "if a tribe can affix penalties to acts done under the immediate direction of the state government, and in obedience to its laws, the operations of the state government may at any time be arrested at the will of the tribe" (internal quotation marks and brackets omitted)). Congress, of course, can revise those boundaries at any time. *See United States* v. *Wheeler*, 435 U.S. 313, 326 (1978) (noting that Tribes have ceded their ability "to determine their external relations" to the Federal Government).

2. Petitioners' primary rejoinder is that the recognition of immunity would impair States' interests in regulating within their territory. *See* Pet. Br. 26-29. Not so.

As an initial matter, the Court has already distinguished state *regulation* of tribal conduct from the application of tribal *immunity*. It has noted that "Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the

State." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-149 (1973). But it has also explained that the rule that "substantive state laws apply to off-reservation conduct" does not mean "that a tribe no longer enjoys immunity from suit." *Kiowa*, 523 U.S. at 755. The immunity of Tribes or tribal officials from state-law tort suits is a federal question distinct from the scope of Connecticut's regulatory power.

For similar reasons, Petitioners' argument about tribal legislative power under *Montana* v. *United States*, 450 U.S. 544 (1981), misses the point. *See* Pet. Br. 29-31. This case does not involve a Tribe's efforts to regulate nonmembers; it involves nonmembers' efforts to circumvent tribal immunity. *Federal* law, not *tribal* law, determines whether a Tribe or its officials enjoy immunity in state court. A Tribe could not demand that immunity of its own accord, except to the extent that its tribal laws inform a federal test. *See, e.g.*, *Regents*, 519 U.S. at 429 n.5 (state law affects arm-of-the-sovereign test); *Hyatt*, 136 S. Ct. at 1282-1283 (state law affects Full Faith and Credit test).

Immunity from tort liability, moreover, says nothing about tribal officials' amenability to *criminal* law. *See* Pet. Br. 26. The Tribe would not be the real party in interest in a criminal case. And neither *Barr* nor the Westfall Act grants any protection from criminal liability. Indeed, the Compact between the Tribe and Connecticut affirms that Connecticut shall "have jurisdiction to enforce" those "criminal laws of the State which are consistent with the provisions of this Compact on the Reservation." Gaming Compact § 4(a). Although there might be exceptional circumstances in which the application of state criminal law would implicate significant sovereignty interests—

perhaps a tribal police officer cited for speeding to an emergency, *see Cabazon Band of Mission Indians* v. *Smith*, 388 F.3d 691 (9th Cir. 2004)—this case does not present them. Connecticut criminal law remains a regulatory backstop for States, as this Court recognized in *Bay Mills*. *See* 134 S. Ct. at 2035.

More to the point, and as *Bay Mills* also recognized, *see id.*, States may bargain over the scope of their regulatory authority. Under IGRA, States and Tribes are required to negotiate compacts governing gaming activities. 25 U.S.C. § 2710(d)(3)(A). Those compacts may include provisions relating to "the application of the criminal and civil laws and regulations of the Indian tribe or the State." *Id.* § 2710(d)(3)(C)(i); *see also id.* § 81(d)(2) (requiring immunity waivers or disclosures in certain land contracts). That is precisely what the Compact between Connecticut and the Tribe does: It requires the Tribe to establish "reasonable procedures for the disposition of tort claims arising from alleged injuries to patrons of its gaming facilities." Gaming Compact § 3(g). Connecticut and the Tribe could have settled on a different contractual term that permitted Connecticut residents to bring tort suits in state court. *See Bay Mills*, 134 S. Ct. at 2035 (observing that "States have more than enough leverage").[8] They did not. Resolution of this case in tribal

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[8] The New Mexico-Santa Clara Compact, for example, permits injured individuals to bring suit in state court or tribal court, under either state or tribal law. *See* Indian Gaming Compact Between the State of New Mexico and Santa Clara Pueblo § 8 (July 16, 2015), https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-033870.pdf. Other compacts permit injured individuals

court thus effects, not undermines, the State's policy choices.

3. Petitioners then shift course and argue that it would be unfair to deprive tort victims of a remedy. Pet. Br. 27-29. The argument that Petitioners are left without a remedy fails as both a factual and a legal matter.

As a factual matter, Petitioners *have* a remedy—in tribal court. Consistent with the Gaming Compact, the Tribe has adopted a remedial system in which suits can be brought directly against the Tribe or its arm, the MTGA. *See* Mohegan Tribal Code § 3-248(a) (providing that "[a]ny person who, *wherever located*, sustains an injury" allegedly caused by an MTGA employee "may file a complaint with the Gaming Disputes Trial Court" (emphasis added)); *id.* § 3-250(b) (waiving the Tribe's sovereign immunity for "tort claims arising under this Code"); Gaming Compact § 3(g) (requiring the Tribe to maintain a remedial system for gaming-related injuries "analogous to that available for similar claims arising against the State"). In fact, other Connecticut residents involved in the *same* car accident at issue here brought suit in tribal court and ultimately obtained

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to bring suit in either state or tribal court once they exhaust a tribal administrative process. *See, e.g.*, Tribal State Compact Between the Choctaw Nation of Oklahoma and the State of Oklahoma § 3(D)(5) (Aug. 17, 1994), www.indianaffairs.gov/cs/groups/xoig/documents/text/idc-038414.pdf; Gaming Compact Between the Seminole Tribe of Florida and the State of Florida § VI.D.4-5 (Apr. 7, 2010), https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-026001.pdf.

substantial sums of money. *See Boskello*, 12 Am. Tribal Law 242; Ryan Blessing, *Mohegan Tribe Settles Lawsuit in 2011 Limo Accident*, Norwich Bulletin (June 26, 2015).

Petitioners contend that various statutory limits on the Tribe's liability render a tribal forum insufficient. *See* Pet. Br. 28. But the relevant provisions of the Tribal Code are standard fare for sovereigns; indeed, most were borrowed from Connecticut law, *see supra* pp. 5-6. Many States likewise deny jury trials, prohibit punitive damages, cap compensatory damages, and restrict damages to the limits of their insurance coverage. *See, e.g.*, 705 Ill. Comp. Stat. Ann. § 505/1 (tort claims against State to be heard by special Court of Claims, rather than jury); Ark. Code Ann. § 21-9-203 (no punitive damages against State); Alaska Stat. Ann. § 09.17.010 (total damages for all claims arising out of single injury or death capped at $400,000); Okla. Stat. Ann., Tit. 47, § 158.2 (liability for operation of motor vehicles limited to amount of insurance); *see generally* Struve, *supra*. The United States also prohibits jury trials and punitive damages in suits under the FTCA. *See* 28 U.S.C. §§ 2402, 2674. On the whole, the Tribe is more generous in its waiver of sovereign immunity than many States—and far more generous than some States, which preclude recovery against both the State and its officials. *See* Ala. Const. art I., § 14 (complete state immunity from damages); *Parker* v. *Amerson*, 519 So. 2d 442, 446 (Ala. 1987) (official immunity from damages). Contrary to Petitioners' portrayal, the Tribe's liability scheme does not include unusually strict limits on their recovery.

As a legal matter, too, there is no uniform rule that all tort victims are entitled to a remedy in court. To

the contrary, immunity doctrines mean that many violations may go unremedied to further other goals of our legal regime. *See Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Eng'g*, 476 U.S. 877 (1986) (concluding that any "perceived inequity" in preserving tribal sovereign immunity "simply must be accepted in view of the overriding federal and tribal interests"); *Scheuer*, 416 U.S. at 242 (explaining that official immunity "assume[s] that it is better to risk some error and possible injury from such error than not to decide or act at all"). The Westfall Act grants federal officials absolute protection from tort liability without providing an equally broad waiver of the Federal Government's sovereign immunity. *Compare* 28 U.S.C. § 2679(b) (federal official immunity), *with id.* § 2680 (federal government immunity). Immunity for foreign officials likewise does not depend on a waiver of the foreign sovereign's immunity. *Compare Yousuf*, 699 F.3d at 774-775 (foreign official immunity), *with* 28 U.S.C. § 1604 (foreign government immunity). Petitioners' complaint that a tribal forum "exists only at the grace of the Tribe," Pet. Br. 28, is thus legally unremarkable.

It is also inaccurate. The availability of a forum is subject to complete congressional control. Congress has used that control to abrogate tribal immunity in certain contexts. *See, e.g.*, 25 U.S.C. §§ 81, 1303, 2710(d)(7)(A)(ii). If Congress believes that tort victims are being left without a remedy, it can limit tribal immunity, whether sovereign or official. *See Bay Mills*, 134 S. Ct. at 2037 ("[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity."). It has not done so. The Tribe's full and fair tort system—crafted in

consultation with Connecticut and consistent with mainstream liability limits—suggests that Congress may feel no pressing need to intervene.

CONCLUSION

The judgment of the Supreme Court of Connecticut should be affirmed.

Respectfully submitted,

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DECEMBER 2016

ADDENDUM

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. **Mohegan Const. art. XIII, § 1 provides:**

Creation of Gaming Authority.

All governmental and proprietary powers of The Mohegan Tribe over the development, construction, operation, promotion, financing, regulation and licensing of gaming, and any associated hotel, associated resort or associated entertainment facilities, on tribal lands (collectively, "Gaming") shall be exercised by The Tribal Gaming Authority, provided that such powers shall be within the scope of authority delegated by The Tribal Council to The Tribal Gaming Authority under the ordinance establishing The Tribal Gaming Authority. Leases and other encumbrances granted by The Tribal Gaming Authority for Gaming development and financing shall be deemed to be for governmental purposes and may be for periods not to exceed 50 years. The Tribal Council shall, by ordinance, establish The Tribal Gaming Authority, which shall oversee, regulate, prudently hold and manage all of the Gaming assets of The Mohegan Tribe. The Tribal Gaming Authority shall have the power to grant a limited waiver of sovereign immunity as to Gaming matters, to contracts relating to Gaming, to the revenues of The Tribal Gaming Authority, to the assets within the control of The Tribal Gaming Authority, and as otherwise authorized by The Tribal Council, but shall have no such right as to

other tribal revenues, assets or powers. Nothing contained in this Section shall limit the power of The Tribal Council to waive the sovereign immunity of The Mohegan Tribe as to Gaming or other matters, or with respect to other tribal revenues or assets. The Tribal Gaming Authority shall have the power to enter into contractual relationships which bind The Mohegan Tribe, provided that such contracts shall be within the scope of authority delegated by The Tribal Council to The Tribal Gaming Authority. Contracts of The Tribal Gaming Authority shall be the law of The Mohegan Tribe and shall be specifically enforceable in accordance with their terms. To the extent that tribal law does not otherwise govern a dispute, the Gaming Disputes Court may apply relevant provisions of Connecticut law. The Tribal Gaming Authority shall have the authority to submit disputes to arbitration. The Tribal Gaming Authority shall have the authority to stipulate for judgment before the Gaming Disputes Court created by Section 2 of this Article. Any stipulation for judgment made by The Tribal Gaming Authority shall be binding on The Mohegan Tribe, The Tribal Gaming Authority and upon the Gaming Disputes Court, provided that such stipulation is within the scope of authority delegated by The Tribal Council to The Tribal Gaming Authority. The Gaming Disputes Court shall grant the relief so stipulated upon a finding that all conditions for granting such relief expressly set forth in such stipulation have been met.

2. **Mohegan Const. art. XIII, § 2 provides:**

Creation of Gaming Disputes Court.

The Tribal Council shall establish, by ordinance the Gaming Disputes Court, which shall be composed of a Trial Branch and an Appellate Branch. Exclusive jurisdiction for The Tribe over disputes arising out of or in connection with the Gaming, the actions of The Tribal Gaming Authority, or contracts entered into by The Mohegan Tribe or Gaming Authority in connection with Gaming, including without limitation, disputes arising between any person or entity and The Tribal Gaming Authority, including customers, employees, or any gaming manager operating under a gaming management agreement with The Tribal Gaming Authority, or any person or entity which may be in privity with such persons or entities as to Gaming matters shall be vested in the Gaming Disputes Court. Notwithstanding the provisions of Article X of this Constitution, the Gaming Disputes Court shall also have exclusive jurisdiction to determine all controversies arising under this Constitution which in any way relate to Gaming.

2.1. *Procedures.* The Gaming Disputes Court shall have the power to enact reasonable rules of procedure. The Gaming Disputes Court may, in its discretion, receive evidence and adjudicate controversy de novo. All proceedings of the Gaming Disputes Court shall be conducted in the state of Connecticut, and shall be open to the public, absent a finding that justice otherwise requires.

2.2. *Remedies.* Nothing in this Article XIII shall preclude or modify the effect of any arbitration

mechanism or other dispute resolution mechanism in any agreement otherwise within the jurisdiction of the Gaming Disputes Court. The Gaming Disputes Court shall have full jurisdiction and authority to compel arbitration, to enforce any arbitration order or other dispute resolution mechanism provision and to mandate any remedy which the Gaming Disputes Court finds justice may require. All findings and orders of the Gaming Disputes Court shall be in writing. In the event that either party to a contract which provides for arbitration seeks an order from the Gaming Disputes Court to compel such arbitration, the Gaming Disputes Court shall not review the merits of the dispute, but shall order the parties to arbitrate; all questions of the enforceability of the agreement to arbitrate, or an obligation to arbitrate the dispute in question, being for the arbitrators to decide.

2.3. *Appointment of Judges.* The Tribal Council shall appoint the Judges of the Gaming Disputes Court. The Tribal Council shall, within thirty days of the adoption of this Article XIII, appoint a minimum number of four Judges for the Gaming Disputes Court. At any time said number of judges falls below four, The Tribal Council shall within thirty days, appoint such additional judges as necessary to restore the minimum number to four judges. If The Tribal Council fails to restore the minimum pool of four within said thirty days, the remaining Judges shall appoint the judges necessary to restore the number to four judges. All judges shall be selected from a publicly available list of eligible retired federal judges or Connecticut Attorney Trial Referees duly appointed by the Chief Justice of the

Connecticut Supreme Court pursuant to Connecticut General Statute § 52-434(a)(4), as amended from time to time, who remain licensed and qualified to practice law in the State of Connecticut, each of whom:

(a) has never been convicted of a felony or any gaming offense;

(b) is not a member of The Tribal Council, or a relative of any such member by blood, marriage, or operation of law;

(c) is of sound mind, trustworthy, and of good moral character;

(d) is able to determine in what cases he or she will be disqualified and is willing to disqualify himself or herself;

(e) is capable of carrying out the duties of the office, including staff administration and supervision; and

(f) is willing to commit, upon public oath of affirmation, to uphold this Constitution and to fairly and impartially adjudicate all matters before the Gaming Disputes Court.

2.4. *Appeals.* Appeals from any decision of the Trial Branch shall be heard by three Judges in the Appellate Branch. Decisions of the Appellate Branch shall be final. There shall be no further right of appeal within The Tribal Court.

2.5. *Compensation.* Judges of the Gaming Disputes Court shall be compensated by The Tribal Council in amounts appropriate to the duties and responsibilities of the office, which compensation shall not be diminished during a judge's

continuation in office. The Gaming Disputes Court shall have the power to take appropriate action to enforce this subsection.

2.6. *Recall and Discipline.* After appointment, Judges of the Gaming Disputes Court shall be subject to discipline and removal for cause pursuant to the Rules of the Court.

3. **Mohegan Tribal Code § 2-21 provides:**

Establishment.

The Mohegan Tribal Gaming Authority ("Authority") is hereby established by The Mohegan Tribal Council on May 15, 1995, pursuant to and consistent with Article XIII of The Mohegan Constitution, and authorized to exercise all governmental and proprietary powers of The Mohegan Tribe over development, construction, operation, promotion, financing, regulation and licensing of gaming, and any associated hotel, associated resort or associated entertainment facilities, on Tribal lands. The authority hereby assumes all obligations, responsibilities and duties of The Mohegan Tribe under Gaming Law existing at the date of enactment of this Article.

4. **Mohegan Tribal Code § 3-21 provides:**

Establishment of Gaming Disputes Court.

There is hereby established the Gaming Disputes Court. The Gaming Disputes Court shall be composed of a Trial Branch and an Appellate Branch. The Trial Branch shall be known as the "Gaming Disputes Trial Court." The Appellate Branch shall be known as the "Gaming Disputes Court of Appeals." This Appellate Court shall not have jurisdiction to

hear or decide any case except cases timely appealed from the Gaming Disputes Trial Court and over which the Gaming Disputes Trial Court properly exercises subject matter jurisdiction pursuant to this Article. The Gaming Disputes Court of Appeals shall have jurisdiction to decide whether any case appealed from the Gaming Disputes Trial Court was within that court's subject matter jurisdiction under this Article and The Mohegan Constitution.

5. **Mohegan Tribal Code § 3-52 provides:**

Sources of Tribal Law.

(a) The substantive law of The Mohegan Tribe for application by the Gaming Disputes Court shall be:

(1) The law as set forth in any Mohegan Tribal ordinances or regulations.

(2) The General Statutes of Connecticut, as may be amended from time to time, are hereby adopted as and declared to be the positive law of The Mohegan Tribe for application by the Gaming Disputes Court, except as such statutes are in conflict with Mohegan Tribal Law.

(3) The common law of the State of Connecticut interpreting the positive law adopted in Subsection (2) above, which body of law is hereby adopted as and declared to be the common law of The Mohegan Tribe for application by the Gaming Disputes Court, except as such common law is in conflict with Mohegan Tribal Law.

6. **Mohegan Tribal Code § 3-131 provides:**

Actions Seeking Relief Against The Tribe or Its Officers or Employees.

In any civil action where relief is sought under this Article against The Mohegan Tribe, its officers or employees, or which alleges any breach of legal duty thereby, the named defendant shall be The Mohegan Tribe or The Mohegan Tribal Gaming Authority as specified in the governing contract or agreement.

7. **Mohegan Tribal Code § 3-244 provides:**

Purpose.

The Mohegan Tribe of Indians of Connecticut, a federally-recognized sovereign Indian tribal nation occupying the Mohegan Reservation on land held in trust by the United States in Uncasville, Connecticut, intends this Code to govern the adjudication of torts arising from actions of the Mohegan Tribe of Indians Connecticut and from actions of the Mohegan Tribal Gaming Authority, and their subordinate entities and their respective authorized officials, agents, employees and representatives acting within the scope of their authority or employment on behalf of such entities, wherever located.

8. **Mohegan Tribal Code § 3-248 provides:**

Procedure.

(a) Any person who, wherever located, sustains an injury as defined in this Code that arises from or out of the Gaming Facilities or that is allegedly caused directly or indirectly by acts or omissions of the MTGA (or its authorized representatives), and who seeks recovery from the MTGA for such alleged

injury, may file a complaint with the Gaming Disputes Trial Court, together with the required filing fee, pursuant to the Rules of Procedure of the Gaming Disputes Court.

(b) Any person who, wherever located, sustains an injury as defined in this Code and who seeks to recover for said injury from any Mohegan Tribal Entity (or its authorized representatives) allegedly caused directly or indirectly by acts or omissions of a Mohegan Tribal Entity other than the MTGA (or its authorized representatives), may file a Complaint with the Mohegan Tribal Court, together with the required filing fee, pursuant to the Rules of Procedure of the Mohegan Tribal Court.

(c) Every complaint filed under this Code shall contain the following:

(1) The name and address of the claimant and the name and address of the claimant's attorney, if any;

(2) A concise statement, in consecutively numbered paragraphs, of the facts giving rise to the complaint;

(3) The date(s), time(s), and location(s) of the alleged injury, if known;

(4) The name of any individual(s) alleged to have caused the alleged injury, and their relationship, if known, to a Mohegan Tribal Entity;

(5) The name of the Mohegan Tribal Entity that is considered liable to the Claimant for the alleged injury;

(6) A concise statement of the nature and extent of any alleged injury sustained by the Claimant; and

(7) If the Complaint is brought by a personal representative of a person under a disability (as defined in this Code), the name of such personal representative and a copy of any officially-dated document probative of the appointment of such personal representative.

(d) No person or entity shall have a right pursuant to this Code to the trial of any matter before a jury.

(e) A final judgment of a Mohegan Trial Court in any action brought under this Code may be appealed pursuant to the applicable Rules of the Mohegan Court in which final judgment [is] entered.

9. **Mohegan Tribal Code § 3-250 provides:**

Limited Waiver of Sovereign Immunity and Consent to Suit.

(a) By enactment of this Code, The Mohegan Tribe waives its sovereign immunity, and the sovereign immunity of its subordinate entities except for the Mohegan Tribal Gaming Authority, and consents to be sued by persons with tort claims arising under this Code, but only in the Mohegan Tribal Court; provided that this waiver of sovereign immunity shall permit no recovery of damages against The Mohegan Tribe or the Mohegan Tribal Entities or their authorized representatives, in any measure or amount in excess of the damages authorized to be recovered under this Code.

(b) By adoption of this Code, the Mohegan Tribal Gaming Authority waives its sovereign immunity

and consents to be sued by persons with tort claims arising under this Code, but only in the Mohegan Gaming Disputes Court; and this waiver of sovereign immunity shall permit no recovery of damages against the Mohegan Tribal Gaming Authority, or its authorized representatives, in any measure or amount in excess of the damages authorized to be recovered under this Code.

(c) The waivers of sovereign immunity contained herein shall be strictly and narrowly construed.

(d) The limitations upon recovery against the sovereign tribal entities and representatives as set forth herein shall not apply to limit recovery against a defendant that is not a Mohegan Tribal Entity or its authorized representative.

(e) This Code shall not apply to any claims by an employee, as defined in this Code, arising in connection with: an application for employment; the rejection of an employment application; or any aspect of the employment relationship. All employment-based rights, claims, and remedies of Mohegan Tribal Entity employees are codified elsewhere, and this Code expressly does not waive the sovereign immunity of The Mohegan Tribe or any Mohegan Tribal Entity and does not contain or express any consent by The Mohegan Tribe or any Mohegan Tribal Entity to be sued for any matter arising out of the employment relationship. The exclusion of such employee claims shall not serve as a bar to claims by an employee when such claims do not arise from or out of any aspect of an employment relationship.

(f) This Code shall not apply to any claim by a person who has a cause of action pending or adjudicated in any other judicial or arbitral forum based upon alleged acts or omissions actionable against any Tribal defendant or entity pursuant to the limited waiver of sovereign immunity contained in the Memorandum of Agreement between the Mohegan Tribe and the State of Connecticut, dated May 28, 2014, regarding law enforcement.

(g) Nothing herein shall be construed as a waiver of either the Mohegan Tribe or the Mohegan Tribal Gaming Authority of its sovereign immunity as to claims arising under any Connecticut General Statute or arising under Connecticut common law.

10. **Mohegan Tribal Code § 3-251 provides:**

Limitations on Awards.

(a) This Code does not permit recovery, from The Mohegan Tribe, the Mohegan Tribal Entities, the Mohegan Tribal Gaming Authority, or from their authorized officers, agents, representatives or Employees while engaged in conduct within the scope of their employment or authority, of:

(1) Punitive or exemplary damages;

(2) Damages for loss of consortium; or

(3) Non-economic damages in excess of two hundred (200) percent of the proven actual damages prior to any reduction for collateral source payments; or

(4) Damages in excess of the limits of any applicable liability insurance policy carried by The Mohegan Tribe, the MTGA, or other Mohegan Entity.

(b) Any award of damages to a claimant shall be reduced in proportion to the claimant's contributory negligence, provided that the claimant shall recover nothing if the claimant's contributory negligence is determined to be greater than fifty (50) percent.

(c) Following the determination of any award for actual damages, the court shall deduct from the actual damages recoverable by the claimant the total amount of collateral sources which have been paid for the benefit of the claimant as of the date the court enters judgment (the "collateral source deduction"), provided that no collateral source deduction shall be made to the extent that a right of subrogation exists with respect to the collateral source. The amount of any write-off, voluntary or involuntary, by a healthcare provider shall constitute a collateral source paid for the benefit of the claimant under this section. The collateral source deduction shall be reduced in proportion to the claimant's comparative negligence, if any. The collateral source deduction from actual damages shall not be reduced in any way by the cost of health insurance premiums or other costs of procurement of the collateral source. Notwithstanding the provisions of section 3-242, all provisions of this sub-section shall be applied both prospectively and retroactively and shall apply to cases already pending in the Mohegan Gaming Disputes Trial court as of November 14, 2012.

11. **Mohegan Tribal Code § 4-52 provides:**

Indemnification.

If the Employee gives the Employer prompt written notice of any claim, demand, or suit, the

Employer shall save harmless and indemnify its Officer or Employee from financial loss and expense arising out of any claim, demand, or suit by reason of his or her alleged negligence or alleged deprivation of any person's civil rights or other act or omission resulting in damage or injury, if the Officer or Employee is found to have been acting in the discharge of his or her duties or within the scope of his or her employment and such act or omission is found not to have been wanton, reckless or malicious. The written notice required under this Section 4-52 shall be sent certified mail to the Attorney General of The Mohegan Tribe and to either the Chairman of the Mohegan Tribal Council or the Chairman of the Management Board of the Mohegan Tribal Gaming Authority as applicable.

12. **Mohegan Tribal Code § 4-53 provides:**

Defense against claims.

The Employer shall provide for the defense of any such Officer or Employee in any civil action or proceeding in any Mohegan Tribal, State or Federal court arising out of any alleged act, omission or deprivation which occurred or is alleged to have occurred while the Officer or Employee was acting in the discharge of his or her duties or in the scope of his or her employment, except that the Employer shall not be required to provide for such a defense whenever the Employer based on its investigation of the facts and circumstances of the case, determines that the Officer or Employee has acted outside the scope of his or her employment or has acted wantonly, recklessly or maliciously. The Employer

shall notify the Official or Employee in writing of this determination.

13. **Conn. Gen. Stat. Ann. § 4-160 provides in pertinent part:**

Authorization of actions against the state

(a) Whenever the Claims Commissioner deems it just and equitable, the Claims Commissioner may authorize suit against the state on any claim which, in the opinion of the Claims Commissioner, presents an issue of law or fact under which the state, were it a private person, could be liable.

* * * * *

(c) In each action authorized by the Claims Commissioner pursuant to subsection (a) or (b) of this section or by the General Assembly pursuant to section 4-159 or 4-159a, the claimant shall allege such authorization and the date on which it was granted, except that evidence of such authorization shall not be admissible in such action as evidence of the state's liability. The state waives its immunity from liability and from suit in each such action and waives all defenses which might arise from the eleemosynary or governmental nature of the activity complained of. The rights and liability of the state in each such action shall be coextensive with and shall equal the rights and liability of private persons in like circumstances.

(d) No such action shall be brought but within one year from the date such authorization to sue is granted. With respect to any claim presented to the Office of the Claims Commissioner for which authorization to sue is granted, any statute of

limitation applicable to such action shall be tolled until the date such authorization to sue is granted. The claimant shall bring such action against the state as party defendant in the judicial district in which the claimant resides or, if the claimant is not a resident of this state, in the judicial district of Hartford or in the judicial district in which the claim arose.

(e) Civil process directed against the state shall be served as provided by section 52-64.

(f) Issues arising in such actions shall be tried to the court without a jury.

* * * * *

14. **Conn. Gen. Stat. Ann. § 4-165 provides in pertinent part:**

Immunity of state officers and employees from personal liability

(a) No state officer or employee shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his or her duties or within the scope of his or her employment. Any person having a complaint for such damage or injury shall present it as a claim against the state under the provisions of this chapter.

* * * * *

15. **28 U.S.C. § 2671 provides:**

Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments,

independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

16. **28 U.S.C. § 2679 provides:**

Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person

shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment

under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

17. **28 U.S.C. § 2680 provides:**

Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of

goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of

investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

RECORD AND BRIEFS

No. 15-1500

In the Supreme Court of the United States

BRIAN LEWIS, ET AL., PETITIONERS

v.

WILLIAM CLARKE

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

No. 15-1500

BRIAN LEWIS, ET AL., PETITIONERS

v.

WILLIAM CLARKE

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

REPLY BRIEF FOR THE PETITIONERS

Because individual-capacity actions operate only against individual government employees, not against the sovereign, they do not implicate sovereign immunity. This Court has repeatedly applied that principle, and applying it here resolves this case.

To the extent Clarke addresses the question presented, he does not try to defend the contrary reasoning of the Connecticut Supreme Court. Instead, he argues that the action in this case—which seeks relief only against him personally—is somehow really against his employer, the Mohegan Tribal Gaming Authority, because the Mohegan Tribe has agreed to indemnify the MTGA's employees. But the application

of sovereign immunity depends on which party will be bound by a judgment, not on who might ultimately bear the economic loss. Many States indemnify their employees, but this Court has never suggested that individual-capacity actions in those States implicate sovereign immunity.

Clarke devotes most of his brief to a different issue: he urges this Court to create a rule of tribal official immunity that is even broader than the common-law immunity of federal employees. That argument is not within the scope of the question presented, which refers only to sovereign immunity, and it was neither raised nor considered below. If the Court nevertheless addresses the argument, it should decline Clarke's invitation to create a new doctrine of tribal official immunity. Federal official immunity rests on the Supremacy Clause and on the principle that the operations of the federal government must be governed by federal law. A rule of tribal official immunity, by contrast, would have no constitutional or statutory basis. And the nature of this case—a tort claim arising from off-reservation commercial activity—illustrates how unjustified such a rule would be. This Court has never held that a tribe's sovereign immunity applies in the context of off-reservation torts. Yet Clarke asks the Court to hold that the tribal employees who commit such torts should enjoy an absolute immunity from individual liability. If such an extraordinary expansion of immunity is desirable, it must come from Congress.

The Court should resolve the question presented by reversing the decision below and holding that the sovereign immunity of an Indian tribe, like the sovereign immunity of the United States or of a State, does not

prevent individual employees from being held accountable for their misconduct.

A. Sovereign immunity does not bar individual-capacity damages actions, even if a government has agreed to indemnify its employees

This Court has held that sovereign immunity "does not erect a barrier against suits to impose 'individual and personal liability'" on government officials, even if that liability is based on acts they performed in the course of their official duties. *Hafer* v. *Melo*, 502 U.S. 21, 30-31 (1991) (quoting *Scheuer* v. *Rhodes*, 416 U.S. 232, 238 (1974)). As explained in the opening brief (at 7-12), that principle answers the question presented here. Because an individual-capacity damages action seeks relief only from an individual employee, not from the sovereign, sovereign immunity does not bar such an action.

Clarke does not defend the contrary reasoning of the Connecticut Supreme Court. Instead, he relies entirely on a theory discussed nowhere in the decision below. In his view, (Br. 15) the Tribe's decision to indemnify the MTGA's employees means that the Tribe "is the real party in interest" in this case. That is so, he maintains, even though the complaint seeks no relief from the Tribe, and even though any judgment could be "executed only against [Clarke's] personal assets," not against the Tribe. *Kentucky* v. *Graham*, 473 U.S. 159, 166 (1985). That argument lacks merit.

1. Clarke first observes (Br. 16) that "the sovereign is the real party in interest if it must pay any adverse judgment." That is correct, and it is dispositive

here because a judgment against Clarke will not bind the Tribe. The Lewises seek a judgment against Clarke personally, and a judgment in their favor will bind only him. If the Tribe has any obligation to pay a judgment against Clarke, that obligation derives from the Tribe's voluntary decision to indemnify the MTGA's employees, not from the judgment itself. See *Demery* v. *Kupperman*, 735 F.2d 1139, 1148 (9th Cir. 1984) ("When * * * the state's obligation to pay damages derives not from the nature of plaintiff's claim, but from an entirely collateral, voluntary undertaking on the part of the state, the federal court is in no way exerting power over the state or the state's treasury."), cert. denied, 469 U.S. 1127 (1985).

According to Clarke (Br. 16), courts apply a "functional" test under which it does not matter whether "a judgment will be formally executed against the sovereign's treasury." He argues that *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), "explained that sovereign immunity attaches if a judgment against the sovereign's agent might 'require action by the sovereign *or disturb* the sovereign's property,'" and he reasons that immunity attaches whenever "a sovereign might be liable 'in effect.'" Br. 16 (quoting *Larson*, 337 U.S. at 687) (emphasis added by Clarke). In fact, the Court in *Larson* held that "the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign," and it explained that "[i]n a suit against the officer to recover damages" from the officer, sovereign immunity does not apply. 337 U.S. at 687. In the other decisions Clarke cites, this Court concluded that the judgment itself would directly bind the sover-

eign. See, *e.g.*, *Edelman* v. *Jordan*, 415 U.S. 651, 655-656 (1974) (plaintiffs sought injunction requiring state officials to pay disability benefits from the state treasury); *Malone* v. *Bowdoin*, 369 U.S. 643, 643-644 (1962) (plaintiffs brought action against Forest Service official to establish that they, not the United States, owned a parcel of land); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 464 (1945) (plaintiff brought action for tax refund and "did not assert any claim to a personal judgment" against defendants).

Clarke attempts (Br. 17-20) to analogize himself to a state instrumentality, noting that a State's financial responsibility for judgments against a state-created agency is one factor in assessing whether that agency shares the State's Eleventh Amendment immunity. But Clarke—an individual hired to drive a limousine—is unlike an instrumentality because he is a natural person, not a creation of tribal law. Significantly, Clarke identifies no cases in which this Court—or any other court—has applied the principles governing state agencies to determine whether sovereign immunity bars an action against a government employee.

More generally, Clarke cites no case in which a court extended sovereign immunity to an action against a government employee simply because the government had indemnified the employee. As noted in the opening brief (at 19), many States indemnify employees who are subject to individual liability because of the performance of their official duties. Yet no courts have applied Clarke's reasoning to conclude that suits against employees of those States implicate the Eleventh Amendment, and as Clarke concedes (Br. 23), many courts have held the exact opposite.

Clarke argues that those cases involved violations of federal law and that, under *Ex parte Young*, 209 U.S. 123, 160 (1908), an official who violates federal law is "stripped of his official or representative character." But this Court has held that the *Young* theory is limited to prospective relief and does not authorize an award of damages against a State. *Edelman*, 415 U.S. at 666-668. Thus, if Clarke were correct that damages actions against indemnified employees are "really * * * against the sovereign" (Br. 19), *Young* would provide no basis for such actions. The reason such actions are permissible is not that *Young* creates an exception to sovereign immunity; it is that a sovereign's decision to indemnify an employee does not convert an individual-capacity action into one that implicates sovereign immunity.

2. Clarke's theory is also inconsistent with the treatment of indemnification in other contexts. In assessing the existence of diversity jurisdiction, for example, courts consider only the citizenship of the real parties to the controversy. *Navarro Sav. Ass'n* v. *Lee*, 446 U.S. 458, 460-461 (1980). But courts have repeatedly held that the real party is the party against whom relief is sought, not another entity that may have agreed to indemnify the defendant. See, *e.g.*, *Corfield* v. *Dallas Glen Hills LP*, 355 F.3d 853, 865 (5th Cir. 2003), cert. denied, 541 U.S. 1073 (2004); *E.R. Squibb & Sons, Inc.* v. *Accident & Cas. Ins. Co.*, 160 F.3d 925, 936 (2d Cir. 1998); cf. *Missouri, Kan. & Tex. Ry. Co.* v. *Hickman*, 183 U.S. 53, 61 (1901). Likewise, an entity that has agreed to indemnify the defendant is not a necessary party whose joinder is required by Federal Rule of Civil Procedure 19. See, *e.g.*, *Gardiner* v. *Vir-*

gin Islands Water & Power Auth., 145 F.3d 635, 641 (3d Cir. 1998); *Rochester Methodist Hosp.* v. *Travelers Ins. Co.*, 728 F.2d 1006, 1016-1017 (8th Cir. 1984). There is no general principle that an entity may be treated as a "real party in interest" merely because it has agreed to indemnify the defendant.

3. Finally, Clarke says (Br. 24) that "indemnification is not truly 'voluntary' for many Tribes, as it is for States," because (Br. 26) tribes may find it necessary to engage in "external commercial activities." Even if that were true, it would not change the reality that an action against a tribal employee is not the same as an action against the tribe itself. In any event, Clarke is wrong to suggest that indemnifying employees is a prerequisite for engaging in commercial activity, and he provides no evidence for his assertion (Br. 25) that, without indemnification, the Tribe "might be forced to forgo the full complement of services incident to self-governance." That assertion is particularly odd in the context of this case, where the "service[]" at issue is driving patrons to and from a casino. In the market for professional drivers, the Tribe's primary competitors are not state governments but other commercial businesses—such as taxi companies, bus lines, and delivery services—that do not enjoy sovereign immunity. The Tribe does not need a special rule of immunity in order to compete with them.

B. Clarke's official-immunity theory is not properly before the Court and lacks merit in any event

Apparently recognizing the weakness of his argument for extending sovereign immunity to individual-capacity damages actions against tribal employees,

Clarke devotes the bulk of his brief to a different issue. He argues (Br. 26-49) that this Court should recognize an "official immunity" that bars actions against tribal employees. He further contends that tribal official immunity should be even broader than the official immunity applicable to federal employees under *Westfall* v. *Erwin*, 484 U.S. 292 (1988), in that it should confer absolute protection against litigation, regardless of whether the challenged conduct involved the exercise of policymaking discretion. Those arguments are not within the question presented and have been forfeited because Clarke failed to raise them below. If the Court does consider them, it should reject Clarke's invitation to create a novel rule of tribal official immunity, particularly one that is even broader than the common-law immunity of federal officials.

1. **Official immunity is not within the question presented and was neither raised nor considered below**

This Court should decline to consider Clarke's official-immunity arguments for two reasons.

First, official immunity is not within the scope of the question presented, which asks "[w]hether the *sovereign immunity* of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment." Pet. i (emphasis added). Clarke attempts (Br. 11) to conflate sovereign immunity and official immunity, describing them as "interrelated." But although they both include the word "immunity," they are distinct doctrines with different origins, and this Court has treated them separately. See, *e.g.*, *Samantar* v.

Yousuf, 560 U.S. 305, 322-323 (2010); *Scheuer*, 416 U.S. at 239-240; *Larson*, 337 U.S. at 687 n.7. Clarke notes (Br. 28) that the petition discussed official immunity in order to explain that "[t]he Connecticut Supreme Court's error was not simply a matter of attaching the wrong label to the immunity that it extended to respondent." Pet. 19. It is common for a petition for a writ of certiorari to point out the absence of an alternative basis for affirming the decision below and to explain that the resolution of the question presented will be outcome-determinative. See Stephen M. Shapiro et al., *Supreme Court Practice* § 4.4(e), at 248-249 (10th ed. 2013). That does not mean that any potential alternative grounds for affirmance thereby become part of the case before this Court.

If Clarke believed that the petition used the term "sovereign immunity" imprecisely, he should have said so in his brief in opposition. Sup. Ct. R. 15.2 ("[T]he brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted."). He did not do so. Instead, the question presented as stated in the brief in opposition refers only to "tribal sovereign immunity" (Br. in Opp. i), with the phrase "official immunity" appearing nowhere in that brief.

Second, official immunity was neither raised nor considered below. Clarke did not assert official immunity in the Connecticut courts, and the Connecticut Supreme Court did not mention official immunity in its decision. Clarke argues (Br. 27) that the court must have "used 'tribal sovereign immunity' as an umbrella term to encompass both sovereign immunity and offi-

cial immunity." In support of that proposition, he observes (Br. 27 n.5) that the defense of sovereign immunity and the defense of official immunity operate "the same way procedurally" because they are both presented in a motion to dismiss and are subject to interlocutory appeal. That does not mean, however, that raising one defense is sufficient to preserve the other. Clarke also suggests (Br. 13) that the decision below should be interpreted as part of a "game of telephone," noting that the Connecticut Supreme Court cited a district court decision that cited a Ninth Circuit decision that cited another Ninth Circuit decision that cited this Court's decision in *Barr* v. *Mateo*, 360 U.S. 564 (1959), which involved official immunity. "It is not the Court's usual practice to adjudicate either legal or predicate factual questions in the first instance," and Clarke's strained reading of the decision below provides no basis for making an exception. *CRST Van Expedited, Inc.* v. *EEOC*, 136 S. Ct. 1642, 1653 (2016).

2. No source of law supports the creation of a doctrine of tribal official immunity

According to Clarke, tribal employees should be immune from individual tort liability under state law. Clarke does not suggest that the rule he seeks already exists, still less that it has any historical basis. Instead, he urges the Court (Br. 30) to "grant tribal officials" the immunity he seeks by creating a new federal common-law rule. He does not, however, identify any source of law that would permit the creation of such a rule. As this Court has explained, federal courts "do not possess a general power to develop and apply their own rules of decision." *City of Milwaukee* v. *Illinois*,

451 U.S. 304, 312 (1981). Instead, federal common law is limited to "'subjects within national legislative power where Congress has so directed' or where the basic scheme of the Constitution so demands." *American Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 421 (2011) (quoting Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 422 (1964)). Clarke's failure to identify any constitutional or statutory basis for a federal common-law rule of tribal official immunity, combined with the uncertain historical basis for tribal sovereign immunity itself, provide substantial reason for this Court to reject Clarke's invitation.

a. Clarke does not attempt to justify tribal official immunity as an extension of tribal sovereign immunity, and with good reason. The initial source of authority for recognizing tribal sovereign immunity as a rule of federal law has been debated. See *Kiowa Tribe of Okla.* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 756 (1998) (noting that the doctrine "developed almost by accident"); *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2046-2049 (2014) (Thomas, J., dissenting). The first cases to address tribal immunity from suit were based on the statutory limits of federal jurisdiction. See, *e.g.*, *Thebo* v. *Choctaw Tribe of Indians*, 66 F. 372, 375 (8th Cir. 1895). Over time, the doctrine developed into the modern concept of tribal sovereign immunity. See *United States* v. *United States Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940) (citing *Thebo* for the proposition that "Indian Nations are exempt from suit without Congressional authorization"). In *Bay Mills*, this Court invoked *stare decisis* to justify continued adherence to the doctrine, and it also reasoned

that tribal sovereign immunity reflects tribes' retention of "their historic sovereign authority," which includes "the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Id.* at 2030 (quoting *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978)). Today, that immunity "is a matter of federal law." *Id.* at 2031 (quoting *Kiowa*, 523 U.S. at 756).

Official immunity, however, is not "inherent in the nature of sovereignty." *Bay Mills*, 134 S. Ct. at 2030 (quoting The Federalist No. 81, at 511 (Alexander Hamilton) (B. Wright ed. 1961)). Rather, it is the product of common law and statutes specific to the federal government. The "inherent" sovereignty of tribes, which this Court has cited as a basis for recognizing a federal rule of tribal sovereign immunity, therefore does not support recognizing a federal rule of tribal official immunity.

b. Clarke's primary argument is that tribal official immunity can be justified on the same basis as federal official immunity. Br. 29; see Gov't Br. 26. As noted in the opening brief (at 22 n.2), however, federal official immunity rests on the supremacy of federal law over that of the States. Clarke disagrees, arguing that federal official immunity "derives from the interest in 'promot[ing] the effective functioning of the Federal Government.'" Br. 30 (quoting *Howard* v. *Lyons*, 360 U.S. 593, 597 (1959)) (brackets in original). That response begs the question. The reason that State law must yield when it interferes with the functioning of the federal government is that the Supremacy Clause says it must. See U.S. Const. Art. VI, Cl. 2. The Constitution does not support a similar displacement of

state law when it comes into conflict with a tribal government.

This Court has explained that "[t]he immunity of federal executive officials began as a means of protecting them in the execution of their federal statutory duties from criminal or civil actions based on state law." *Butz* v. *Economou*, 438 U.S. 478, 489 (1978). As the Court has held, unless Congress has provided otherwise, "the activities of the Federal Government are free from regulation by any state." *Mayo* v. *United States*, 319 U.S. 441, 445 (1943); see *Arizona* v. *California*, 283 U.S. 423, 451 (1931); *Johnson* v. *Maryland*, 254 U.S. 51, 57 (1920). That is because "the constitution and the laws made in pursuance thereof are supreme; * * * they control the constitution and laws of the respective States, and cannot be controlled by them." *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 426 (1819); see *Tennessee* v. *Davis*, 100 U.S. 257, 263 (1879) (noting that the federal government "can act only through its officers and agents, and they must act within the States," so that "if their protection must be left to the action of the State court," then "the operations of the general government may at any time be arrested at the will of one of its members"); *In re Neagle*, 135 U.S. 1, 75-76 (1890). Consistent with those principles, the government argued in *Westfall* that federal official immunity was "supported by the well-settled principle that, absent a congressional determination to the contrary, federal activities must be governed by federal standards, not state law." Gov't Br. at 28, *Westfall*, *supra* (No. 86-714).

The Constitution does not make tribal law supreme over state law. Accordingly, the principles that have

supported the recognition of federal official immunity do not support the creation of a similar immunity for tribal officials.

c. Clarke alludes to two other bases for creating a rule of tribal official immunity, but neither is persuasive. First, he notes (Br. 29) that certain officials enjoy absolute immunity or qualified immunity "from civil liability for violations of federal law." But when federal law creates a cause of action, federal law can provide immunity. Creating immunity from state-law liability is different, and it requires some other constitutional or statutory justification. Second, he identifies (Br. 30) a federal statute that recognizes an interest in "strong tribal governments." 25 U.S.C. 4301(a)(6). The cited provision is part of the Native American Business Development, Trade Promotion, and Tourism Act of 2000, Pub. L. No. 106-464, 114 Stat. 2012, which created an Office of Native American Business Development within the Department of Commerce and directed it to promote tribal exports and tourism. Nothing in that statute pertains to litigation against tribal employees or suggests that Congress contemplated judicial creation of a rule of tribal official immunity.

3. Tribal official immunity should be no broader than the federal official immunity recognized in *Westfall*

To the extent a common-law rule of tribal official immunity is somehow justified, it should not exceed the federal official immunity applied in *Westfall*. See Gov't Br. 26-32. Under that standard, an official is immune from suit when "the challenged conduct is

within the outer perimeter of an official's duties and is discretionary in nature." *Westfall*, 484 U.S. at 300.

Clarke argues (Br. 30) that "*Westfall* was an outlier" that misstated the common law and has since been "repudiated." Clarke's account of the history of federal official immunity is inaccurate. The Court's decision in *Barr*—which Clarke takes to be a correct statement of the common law from which *Westfall* was a misguided departure—did not announce a categorical rule of immunity for all federal employees in all circumstances. To the contrary, Justice Harlan's plurality opinion repeatedly emphasized the discretionary nature of the conduct at issue in that case. *Barr*, 360 U.S. at 574-575. As the Court noted in *Westfall*, "*Barr* did not purport to depart from the widely followed common-law rule that only discretionary functions are immune from liability." 484 U.S. at 298 n.4. The unanimous decision in *Westfall* therefore did not "change" (Br. 34) the law as it was set out in *Barr* or as it had been applied by many lower courts. Rather, *Westfall* resolved a circuit conflict that had arisen because several courts of appeals had already held that federal official immunity is limited to discretionary conduct. 484 U.S. at 295 n.2.

Clarke also struggles to account for the series of pre-*Westfall* statutes that Congress enacted to provide immunity to particular categories of federal employees. See Pet. Br. 15-16; Gov't Br. 24-25. The most prominent of those statutes is the Federal Drivers Act, which would have been superfluous under Clarke's view of the law. Act of Sept. 21, 1961, Pub. L. No. 87-258, 75 Stat. 539. Clarke speculates (Br. 34) that because the statute was passed "shortly after"

Barr—in reality, two years later—Congress might not have been "aware of the case." But courts "assume that Congress is aware of existing law when it passes legislation," and the more plausible explanation of why the legislative history does not discuss *Barr* is that Congress correctly recognized that *Barr* did not establish the broad rule that Clarke believes it did. *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990). As for the later statutes, Clarke suggests (Br. 34) that they represented efforts "to *correct* the errors of outlier courts," but that theory is belied by the legislative history. See, *e.g.*, S. Rep. No. 1264, 94th Cong., 2d Sess. 3 (1976) ("Defense medical personnel have *long been subject* to personal liability for actions arising out of their official medical duties.") (emphasis added).

Clarke emphasizes (Br. 37-38) that after *Westfall* was decided, Congress enacted a statute creating a broader official immunity for federal employees. Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563. That statute does not mean that this Court was wrong about what the common law provided, only that Congress wished to adopt a different rule. Significantly, the Westfall Act does not cover tribal employees, and it was enacted against the backdrop of the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, which provides a waiver of federal sovereign immunity from tort claims, a waiver that many tribes have not enacted. It would hardly "respect[] the dialogue between the branches" (Br. 38) to wrench the statute from its context and apply it to a situation not covered by its text and never contemplated by Congress.

Clarke urges this Court to "pay close attention to the policy judgments embodied in the Westfall Act" (Br. 39), but all of those policy judgments pertained to *federal* employees. He argues (Br. 42) that tribal employees need immunity more than federal employees do because tribes "are heavily reliant on outward-facing commercial activities." But this case demonstrates that employees engaged in commercial activities are poor candidates for a broad immunity rule. When a tribe is conducting traditional governmental functions, the application of state law to its activities may in some circumstances "infringe[] on the right of reservation Indians to make their own laws and be ruled by them." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (quoting *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973)). Federal laws and policies may therefore preempt some applications of state laws to such activities. See *Mescalero Apache Tribe*, *supra*; *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980). But when a tribe is engaged in off-reservation commercial activity such as transporting patrons to and from a casino, application of nondiscriminatory state tort law will in no way interfere with tribal self-government. Nor will it prevent the tribe from attracting "the brightest and best" employees, who would be equally subject to state tort law if they were to work for the tribe's private-sector competitors. Br. 42 (citation omitted). Likewise, the need to ensure "fearless, vigorous, and effective administration"—an important consideration in the context of policymaking or law-enforcement officials—has little relevance to

the employees of a commercial enterprise. *Barr*, 360 U.S. at 571 (opinion of Harlan, J.).

4. Clarke's conduct did not involve the exercise of discretion

Clarke argues (Br. 49 n.7) that "driving may in some circumstances entail meaningful discretion," and that he would therefore be entitled to immunity even under *Westfall*. In fact, negligent driving is a classic example of a nondiscretionary activity. See *United States* v. *Gaubert*, 499 U.S. 315, 325 n.7 (1991); *Dalehite* v. *United States*, 346 U.S. 15, 28 (1953). Even the case on which Clarke relies acknowledged that "ordinary driving in routine traffic" does not involve meaningful discretion. *McBride* v. *Bennett*, 764 S.E.2d 44, 47 (Va. 2014) (quoting *Friday-Spivey* v. *Collier*, 601 S.E.2d 591, 595 (Va. 2004)). If the Court announces a *Westfall*-like rule of tribal official immunity, it should therefore hold that immunity does not apply to this case.

C. Applying any form of immunity in this case would be unfair and anomalous

This Court has already questioned the appropriateness of applying tribal sovereign immunity when doing so would foreclose the ability of "a tort victim, or other plaintiff who has not chosen to deal with a tribe * * * to obtain relief for off-reservation commercial conduct." *Bay Mills*, 134 S. Ct. at 2036 n.8. The Court should not erect a barrier to such relief by extending tribal sovereign immunity or creating a novel rule of official immunity for tribal employees.

1. This Court has recognized that a State retains the authority to "enforce its law on its own lands."

Bay Mills, 134 S. Ct. at 2035. Clarke argues (Br. 52) that "[t]he immunity of Tribes or tribal officials from state-law tort suits is * * * distinct from the scope of Connecticut's regulatory power," which leaves unanswered the question how, in practice, a State can meaningfully enforce its law when neither tribal employees nor a tribe itself can be sued for the off-reservation torts that they commit. Clarke does at least acknowledge (Br. 52-53) that a tribal employee is subject to state criminal law, but that concession highlights the oddity of an immunity from civil liability. It makes little sense to say that misbehaving tribal employees may be sent to prison but may not be made to compensate their victims.

Clarke responds (Br. 54-57) that victims may be compensated; they simply need to seek redress from the Tribe in tribal court. He emphasizes (Br. 53) that the compact between Connecticut and the Tribe provides for compensating casino patrons who are injured. That compact provision protects patrons who are injured on the reservation and who might lack a state-court tort remedy. It does not address plaintiffs like the Lewises, who never visited the Mohegan reservation and had no contact with the Tribe until they became the unwitting victims of Clarke's negligence.

Even though the Mohegan Tribe would allow a tribal-court action in these circumstances, many tribes would not. Pet. Br. 28. It is therefore certain, not just "theoretically possible" (Br. 47), that Clarke's rule will leave some victims uncompensated. And Clarke's claim (Br. 50) that that immunity is necessary in order to protect tribes from "crippling liability" suggests that he agrees that immunity will result in the under-

compensation of victims—indeed, he welcomes the prospect.

2. Clarke argues (Br. 45) that an employee of any other sovereign would be absolutely immune in these circumstances. That is incorrect, and it obscures what is truly anomalous about the rule Clarke advocates. Because the Tribe has refused to waive its sovereign immunity except in its own courts, Clarke's rule would mean that the victims of off-reservation torts committed by tribal employees would be unable to seek relief in the courts of the place where the accident occurred. Instead, they would have to seek redress in the courts of a different sovereign. No other sovereign enjoys that kind of immunity.

Foreign officials. Clarke attempts (Br. 44-45) to analogize himself to an employee of a foreign government. But foreign-government drivers have not traditionally been immune from individual-capacity negligence actions. See *Restatement (Second) of the Foreign Relations Law of the United States* § 66 cmt. b, at 201-202 (1965); *Rishikof* v. *Mortada*, 70 F. Supp. 3d 8, 15 (D.D.C. 2014). In any event, if Clarke were employed by a foreign government, the Lewises could sue his government in an American court. See 28 U.S.C. 1605(a)(2) (commercial-activity exception to Foreign Sovereign Immunities Act); see also 28 U.S.C. 1605(a)(5) (domestic-tort exception). They would not need to seek relief in a foreign forum.

Employees of the United States or Connecticut. If Clarke were employed by the federal government, an action against him would be converted into an action against the United States, and the Lewises could pursue that action in the District of Connecticut. 28

U.S.C. 2679(d). Similarly, if he were employed by the State of Connecticut, they could sue the State in Connecticut state court. Conn. Gen. Stat. § 4-141 *et seq.* In neither case would they need to bring an action in the courts of a different sovereign.[1]

Employees of another State. Clarke contends (Br. 45) that he would be absolutely immune from suit in Connecticut if he were an employee of another State. That is incorrect.

This Court has held that a state court is not bound to respect the sovereign immunity of another State. *Franchise Tax Bd.* v. *Hyatt*, 538 U.S. 488, 497 (2003) ("[T]he Constitution does not confer sovereign immunity on States in the courts of sister States."); *Nevada* v. *Hall*, 440 U.S. 410 (1979). But the Court has also held that the Full Faith and Credit Clause, U.S. Const. Art. IV, § 1, prohibits a state court from applying a "special rule" that treats another State worse than the forum State would treat itself. *Franchise Tax Bd.* v. *Hyatt*, 136 S. Ct. 1277, 1282 (2016) (*Franchise Tax Board II*). A state court may not, for example, permit the recovery of damages against an agency of another State in an amount greater than it would permit against its own agencies. *Ibid.*

This Court has not considered whether the principles articulated in *Franchise Tax Board II* apply to

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[1] Clarke asserts (Br. 55) that "some States * * * preclude recovery against both the State and its officials." The only example he offers is that of Alabama, but the Alabama Supreme Court has held that a state-employed driver is *not* immune from negligence liability. *Ex parte Cranman*, 792 So. 2d 392, 404 (Ala. 2000). So far as we are aware, every State would permit recovery against either its employee or the State itself in these circumstances.

individual-capacity actions against state employees, as opposed to actions against a State itself. Assuming *arguendo* that they do, then if Clarke were an employee of a State other than Connecticut, the Connecticut state court would be compelled to treat him no less favorably than it would treat a Connecticut employee. Here, that means that a Connecticut court would grant Clarke immunity *and* would permit an action against the State that employed him.

The Tribe, however, has made such a resolution impossible by refusing to waive its immunity except in its own courts. In effect, Clarke and the Tribe wish to take advantage of the rule of *Franchise Tax Board II* while avoiding the rule of *Hall*, thus ensuring that neither the Tribe nor its employees can be subject to suit in Connecticut. Instead, Clarke's position is that a state-law negligence action against a driver personally, based on conduct occurring entirely within Connecticut, may be brought only in the courts of the Tribe—a jurisdiction with which the Lewises have had no voluntary contact—where tribal law would define the standards of negligence and the limits on liability. That is an unprecedented expansion of tribal adjudicatory jurisdiction and a corresponding usurpation of Connecticut's right to enforce its own public policy of providing safe highways for those in Connecticut. See *Franchise Tax Board II*, 136 S. Ct. at 1281 (The Full Faith and Credit Clause "does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another State reflecting a conflicting and opposed policy.") (quoting *Carroll* v. *Lanza*, 349 U.S. 408, 412 (1955)). The resulting immunity from suit in Connecticut courts is in

no way comparable to what any other State would enjoy.[2]

* * * * *

For the foregoing reasons and those stated in the opening brief, the judgment of the Connecticut Supreme Court should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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DECEMBER 2016

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[2] *Amici* National Congress of American Indians et al. suggest (at 8-24) that the decision below may be construed to rest on a state-law theory of comity. But where, as here, "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," then this Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Michigan* v. *Long*, 463 U.S. 1032, 1040-1041 (1983).

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Supreme Court, U.S.
FILED
NOV 21 2016
OFFICE OF THE CLERK

No. 15-1500

In the Supreme Court of the United States

BRIAN LEWIS, ET AL., PETITIONERS

v.

WILLIAM CLARKE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether the sovereign immunity of a federally recognized Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment.

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In the Supreme Court of the United States

No. 15-1500

BRIAN LEWIS ET AL., PETITIONERS

v.

WILLIAM CLARKE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES

The United States has long been "committed to a policy of supporting tribal self-government and self-determination." *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845, 856 (1985). A tribe's sovereign immunity from suit is one important protector of tribal autonomy. The United States therefore has an interest in ensuring the correct application of the doctrine of tribal sovereign immunity.

STATEMENT

1. This case arises out of an automobile accident involving an employee of the Mohegan Tribal Gaming Authority (Gaming Authority), which is an arm of the federally recognized Mohegan Tribe of Indians of Connecticut (the Tribe). Pet. App. 4a & n.4; 81 Fed. Reg. 26,829 (May 4, 2016). Respondent was employed by the Gaming Authority as a limousine driver. On

October 22, 2011, while respondent was driving patrons of the Mohegan Sun Casino to their homes in a limousine owned and insured by the Gaming Authority, he rear-ended petitioners' vehicle. The accident occurred on Interstate 95 near Norwalk, Connecticut, outside the Tribe's reservation. Pet. App. 2a-3a, 20a.

2. The Tribe has waived the sovereign immunity of the Gaming Authority and consented to suits "by persons with tort claims arising under th[e Mohegan Torts] Code, but only in the Mohegan Gaming Disputes Court." Mohegan Tribe of Indians Code (Mohegan Tribal Code), Ch. 3, Art. IV, § 3-250(b). The Tribal Code governs "the adjudication of torts arising from actions of the [Gaming Authority], and * * * [its] authorized officials, agents, employees and representatives acting within the scope of their authority or employment on behalf of [the Gaming Authority], wherever located." *Id.* § 3-244; see also *id.* § 3-248(a). The Tribal Code provides that "[n]othing herein shall be construed as a waiver of either the Mohegan Tribe or the [Gaming Authority] of its sovereign immunity as to claims arising under any Connecticut General Statute or arising under Connecticut common law." *Id.* § 3-250(g).

The Tribal Code does not permit recovery from the Gaming Authority or its employees of (1) punitive damages, (2) damages for loss of consortium, (3) noneconomic damages in excess of 200% of the proven actual damages, or (4) "[d]amages in excess of the limits of any applicable liability insurance policy carried by" the Tribe or the Gaming Authority. Ch. 3, Art. IV, §§ 3-250(b), 3-251(a).

In addition, the Tribal Code provides that if an employee gives the Gaming Authority prompt notice, the

Gaming Authority "shall save harmless and indemnify its Officer or Employee from financial loss and expense arising out of any claim, demand, or suit by reason of his or her alleged negligence * * * or other act or omission resulting in damage or injury, if the Officer or Employee is found to have been acting in the discharge of his or her duties or within the scope of his or her employment and such act or omission is found not to have been wanton, reckless or malicious." Ch. 4, Art. III, § 4-52. The Tribal Code further provides that the Gaming Authority "shall provide for the defense" of its employees "in any civil action or proceeding in any Mohegan Tribal, State or Federal court" arising from torts alleged to have been committed while acting within the scope of employment. *Id.* § 4-53.

3. Although petitioners could have sued the Gaming Authority in the Mohegan Gaming Disputes Court, they instead filed a state-law negligence action against respondent in Connecticut Superior Court. Pet. App. 18a. Petitioners initially named both respondent and the Gaming Authority as defendants. Shortly thereafter, petitioners voluntarily dismissed their claims against the Gaming Authority and filed an amended complaint against respondent alone, seeking damages from him personally. *Id.* at 18a-19a. Respondent moved to dismiss petitioners' amended complaint for lack of subject matter jurisdiction. Respondent argued that, because he was acting within the scope of his employment when the accident occurred, the negligence claim against him was barred by tribal sovereign immunity. *Id.* at 22a.

The Connecticut Superior Court denied respondent's motion to dismiss. Pet. App. 18a-36a. The

court held that the Gaming Authority's sovereign immunity did not protect respondent from being sued "in his individual capacity for an alleged tort occurring off the tribal reservation injuring non-patrons" of the Mohegan Sun Casino. *Id.* at 25a. The court explained that "sovereign immunity does not extend to a tribal employee who is sued in his individual capacity when damages are sought from the employee, not from the tribe, and will in no legally cognizable way affect the tribe's ability to govern itself independently." *Id.* at 22a-23a; see *id.* at 25a-36a. In this case, the court noted, petitioners "seek money damages not from the sovereign Mohegan Tribe but from [respondent] personally." *Id.* at 27a.

The Superior Court rejected respondent's argument that the Gaming Authority, and not respondent, is the real party in interest because it is "obligated to defend and indemnify [respondent] pursuant to the Mohegan Tribal Code," and any judgment against respondent would therefore be paid from the Gaming Authority's assets. Pet. App. 34a-35a; see Mohegan Tribal Code, Ch. 4, Art. III, §§ 4-52, 4-53. The court explained that "[a] voluntary undertaking cannot be used to extend sovereign immunity where it did not otherwise exist." Pet. App. 35a.

4. The Connecticut Supreme Court reversed and remanded with directions to grant respondent's motion to dismiss. Pet. App. 1a-17a. The court explained that "Indian tribes are domestic dependent nations that exercise inherent sovereign authority," which includes the common-law immunity from suit traditionally enjoyed by sovereign powers. *Id.* at 7a (quoting *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)). "It is

well established," the court then stated, that "the doctrine of tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority." *Id.* at 10a (quoting *Romanella* v. *Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996), aff'd, 114 F.3d 15 (2d Cir. 1997) (brackets omitted)); see generally *id.* at 11a-17a. The court therefore concluded that petitioners' claims were barred by tribal sovereign immunity because "the undisputed facts establish that [respondent] was acting within the scope of his employment" at the time of the collision. *Id.* at 10a, 16a.

In the Connecticut Supreme Court's view, "when the complaint concerns actions taken in [the] defendant's official or representative capacit[y]" and within the scope of his employment, a plaintiff "cannot circumvent tribal immunity by merely naming officers or employees of the [t]ribe." Pet. App. 11a (quoting *Chayoon* v. *Chao*, 355 F.3d 141, 143 (2d Cir.) (per curiam), cert. denied, 534 U.S. 966 (2004)); see *id.* at 12a-13a. Instead, the court continued, "a tribal official—even if [named] in his 'individual capacity'—is only 'stripped' of tribal immunity when he acts 'manifestly or palpably beyond his authority.'" *Id.* at 13a (quoting *Bassett* v. *Mashantucket Pequot Museum & Research Ctr., Inc.*, 221 F. Supp. 2d 271, 280 (D. Conn. 2002)).

SUMMARY OF ARGUMENT

I. A. Sovereign entities, including Indian tribes, are generally entitled to immunity from suit in the United States. Where a plaintiff names an employee of the sovereign as defendant, rather than the sovereign itself, the suit may nevertheless be barred by sovereign immunity, depending on whether the claim

seeks relief from the individual in an official capacity or in a personal capacity.

A suit against an employee of the sovereign is an official-capacity suit if the requested relief would run against the government—for example, where the plaintiff seeks an award of benefits wrongfully withheld or a refund of taxes paid. A personal-capacity suit, on the other hand, seeks to impose personal liability on a government employee for actions taken in the course of his employment. The rule that sovereign immunity does not bar personal-capacity damages suits arising out of an employee's performance of official duties has been applied to federal and state employees alike.

B. Tribal sovereign immunity arises from the same principles underlying federal and state sovereign immunity, and the Court should therefore apply the same analysis to determine whether a suit against a tribal employee is an official-capacity suit that should be treated as a suit against the Tribe itself.

C. Petitioners' suit is an action against respondent in his personal capacity and therefore is not barred by the Tribe's sovereign immunity. The Connecticut Supreme Court reached the opposite conclusion by relying on decisions holding that a claim directly related to a tribal employee's performance of his official duties is a claim against the sovereign and could not be considered a personal-capacity claim. Those holdings are directly contrary to the settled rule that distinguishing between a personal-capacity suit and an official-capacity suit turns not on the conduct that gave rise to the suit, but on the party against whom relief is sought.

II. A. Although sovereign immunity does not bar personal-capacity suits against employees of a sover-

eign, employees who are sued in their personal capacities may raise the related but distinct defense of *official* immunity. For negligence actions, this Court held that federal common law immunized federal employees from liability arising out of actions that involve the employee's exercise of "discretionary" judgment. *Westfall* v. *Erwin*, 484 U.S. 292, 295-297 (1988). That common-law rule reflects a balance between the benefits and costs of insulating government employees from suit. That limitation on official immunity of federal employees has now been superseded by the Westfall Act, 28 U.S.C. 2679, which confers absolute immunity on federal employees and substitutes the United States as defendant under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680.

B. The same concerns that justified recognition of official immunity for federal employees as a matter of federal common law justify affording official immunity to tribal employees. A tribe's ability to exercise its sovereign powers, like that of the federal government, depends on the freedom of its employees to exercise independent judgment. The respect owed to tribal sovereignty and self-government therefore supports the common-law defense of official immunity for tribal employees sued under state tort law. The scope of that immunity for negligence claims applies only to actions involving the exercise of discretionary judgment.

Although federal employees now enjoy complete *statutory* immunity from tort liability, the purposes of the common-law defense counsel against extending that broader immunity to tribal employees as a matter of federal common law. That is especially so because the statutory immunity conferred on federal employees is coupled with a waiver of sovereign immunity

enabling injured plaintiffs to sue the United States, and because Congress has conferred absolute immunity on certain tribal employees (likewise coupled with substitution of the United States under the FTCA) but has not done so for respondent. The Connecticut courts could, however, extend a broader immunity defense to tribal employees, or defer to the Tribe's waiver of its sovereign immunity or to tribal law, as a matter of comity.

C. The Connecticut courts would be free on remand to consider the possibility that respondent is entitled to an official-immunity defense to the extent that issue remains open as a procedural matter.

ARGUMENT

I. TRIBAL SOVEREIGN IMMUNITY DOES NOT BAR TORT SUITS THAT SEEK DAMAGES AGAINST TRIBAL EMPLOYEES IN THEIR PERSONAL CAPACITIES

A. Sovereign Immunity Does Not Bar Personal-Capacity Suits Against Employees Of The Sovereign

Sovereign entities, including Indian tribes, are generally entitled to immunity from suit in the United States, unless that immunity is waived by the sovereign or validly abrogated by Congress. See *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014); *Alden* v. *Maine*, 527 U.S. 706, 713 (1999); *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775, 779 (1991); *Price* v. *United States*, 174 U.S. 373, 375-376 (1899). It is also well established that even where a plaintiff names an officer or employee of the sovereign as defendant (rather than the sovereign itself), the suit may nevertheless be barred by sovereign immunity. *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459,

464 (1945). Whether sovereign immunity bars such a suit depends on whether plaintiff seeks relief from that individual in his official or his personal capacity. *Hafer* v. *Melo*, 502 U.S. 21, 25 (1991); *Kentucky* v. *Graham*, 473 U.S. 159, 166 (1985).

1. A suit against an officer or employee of the sovereign is an official-capacity suit if the plaintiff "must look to the government entity itself" for relief. *Graham*, 473 U.S. at 166. For example, in *Edelman*, the plaintiff sued state officials alleging that they had administered a federal-state program in violation of federal law and requested as relief "a permanent injunction enjoining the defendants to award to the entire class of plaintiffs all * * * benefits wrongly withheld." 415 U.S. at 656 (citation omitted). The Court observed that the requested funds "will obviously not be paid out of the pocket of petitioner Edelman" and instead would "inevitably come from the general revenues of the State of Illinois." *Id.* at 664-665. The court therefore concluded that the requested award "resemble[d] far more closely [a] monetary award against the State itself" and was barred by sovereign immunity. *Ibid.*

Similarly, in *Ford Motor Co.*, the Court held that a taxpayer action against Indiana officials seeking a refund of taxes paid under protest was "in essence one for the recovery of money from the state." 323 U.S. at 464 (citation omitted). Because the State was "the real, substantial party in interest," it was "entitled to invoke its sovereign immunity from suit even though individual officers [we]re nominal defendants." *Ibid.* (citation omitted).

Official-capacity suits against an officer or employee of a sovereign "generally represent only another

way of pleading an action against [the] entity of which [the] officer is an agent." *Graham*, 473 U.S. at 165 (quoting *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)). Sovereign immunity therefore bars such suits, even though they are nominally directed at the sovereign's agent. See *Edelman*, 415 U.S. at 663; *Ford Motor Co.*, 323 U.S. at 462-463; see also *Graham*, 473 U.S. at 166 ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."). Sovereign immunity does not, however, bar official-capacity suits against state officers to the extent the suit seeks prospective injunctive relief to prevent a state officer from violating federal law. See *Edelman*, 415 U.S. at 664-665 (citing *Ex parte Young*, 209 U.S. 123 (1908)).

2. Personal-capacity suits, on the other hand, seek to impose *personal* liability on government officers and employees for actions taken in the course of their governmental duties. *Graham*, 473 U.S. at 165; see *Scheuer* v. *Rhodes*, 416 U.S. 232, 237-238 (1974), abrogated on other grounds by *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). The operative question in determining whether a suit is against a government officer or employee in his personal capacity is whether the suit seeks relief that operates against the agent's personal interests (such as the payment of damages from his own assets)—*not* whether the suit challenges actions the agent took in the course of his or her official duties. *Hafer*, 502 U.S. at 26-27; see *Graham*, 473 U.S. at 165-166.

Such suits seeking to recover damages from the officer or employee personally are not considered suits against the sovereign, even though they arise out of the agent's work for the sovereign, and they therefore

are not barred by sovereign immunity. As this Court has explained, if the "wrongful actions" of "[g]overnment officers" are "such as to create a personal liability, whether sounding in tort or in contract, the fact that the officer is an instrumentality of the sovereign does not, of course, forbid a court from taking jurisdiction over a suit against him." *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 686 (1949). Thus, "[i]n a suit against the officer to recover damages for the agent's personal actions" in the performance of his duties, the "question is easily answered" that the suit is not against the government and is not barred by sovereign immunity. *Id.* at 687; accord, *e.g.*, *Hafer*, 502 U.S. at 30; *Ford Motor Co.*, 323 U.S. at 462. That rule has been applied to federal and state employees alike. See, *e.g.*, *Larson*, 337 U.S. at 687-688 (federal official); *Hafer*, 502 U.S. at 26-27 (state official).[1]

Furthermore, a sovereign's voluntary agreement to indemnify its agents for personal-capacity liability aris-

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[1] A parallel distinction is drawn between suits against foreign sovereigns and their officers and employees. The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1602 *et seq.*, governs the sovereign immunity of a foreign state and its agencies and instrumentalities, while the immunity of individual officers and employees of a foreign government is governed by distinct procedures and substantive standards applied by the Executive, informed by principles of international law. See *Samantar* v. *Yousuf*, 560 U.S. 305, 311-312 (2010); see also *id.* at 321-323. A suit against a foreign official seeking damages from his own pocket is governed by official immunity because it is not a suit against the foreign state itself. See *id.* at 325. A suit against a foreign official in his official capacity, by contrast, may be treated as a suit against the foreign state itself, as the state is the real party in interest. See *ibid.* (citing *Graham*, 473 U.S. at 166).

ing out of their official actions does not convert suits against them into suits against the sovereign. See, *e.g.*, *Blalock* v. *Schwinden*, 862 F.2d 1352, 1354 (9th Cir. 1988); *Duckworth* v. *Franzen*, 780 F.2d 645, 650 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986); *Wilson* v. *Beebe*, 770 F.2d 578, 588 (6th Cir. 1985) (en banc); cf. *Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 430-431 (1997) (fact that state university would be indemnified by federal government did not divest university of Eleventh Amendment immunity; "the presence or absence of a third party's undertaking to indemnify the agency should [not] determine whether it is the kind of entity that should be treated as an arm of the State").

B. Sovereign Immunity Likewise Does Not Bar Personal-Capacity Suits Against Tribal Employees

Tribal sovereign immunity arises from the same principles that underlie federal and state sovereign immunity. The Court should therefore apply the analysis described above to determine whether a suit against a tribal employee is an official-capacity suit that must be treated as a suit against the Indian tribe itself, or instead is a personal-capacity suit against the tribal employee.

"Indian tribes are domestic dependent nations that exercise inherent sovereign authority." *Bay Mills*, 134 S. Ct. at 2030 (internal quotation marks omitted). One "core aspect[]" of tribal sovereignty is the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Ibid.* (quoting *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978)). That remedy is "a necessary corollary to Indian sovereignty and self-governance." *Ibid.* (quoting *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Eng'g, P.C.*,

476 U.S. 877, 890 (1986)); see *Bay Mills*, 134 S. Ct. at 2030 ("It is 'inherent in the nature of sovereignty not to be amenable' to suit without consent.") (quoting The Federalist No. 81, at 511 (Alexander Hamilton) (B. Wright ed. 1961)). This Court accordingly has long recognized that Indian tribes enjoy sovereign immunity from suit and that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla.* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998); see *Bay Mills*, 134 S. Ct. at 2030-2031; *Oklahoma Tax Comm'n* v. *Citizens Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991); *Three Affiliated Tribes*, 476 U.S. at 890-891; *Santa Clara Pueblo*, 436 U.S. at 58; *Puyallup Tribe, Inc.* v. *Department of Game*, 433 U.S. 165, 172-173 (1977). Tribal sovereign immunity applies to suits based on activities (including commercial activities) both on and off the tribe's reservation. *Bay Mills*, 134 S. Ct. at 2031, 2036-2039; *Kiowa*, 523 U.S. at 758.

The contours of tribal sovereign immunity are "a matter of federal law." *Bay Mills*, 134 S. Ct. at 2031 (quoting *Kiowa*, 523 U.S. at 756). Accordingly, the same foundational principle that applies as a matter of federal law to federal and state sovereign immunity—that sovereign immunity shields only the sovereign itself—should be applied to tribal sovereign immunity as well. Indeed, the Court has already recognized that suits for prospective injunctive relief may be brought against tribal officials. *Id.* at 2035; *Santa Clara Pueblo*, 436 U.S. at 59; see also *Vann* v. *Kempthorne*, 534 F.3d 741, 749-750 (D.C. Cir. 2008).

This Court has previously declined to extend tribal sovereign immunity to bar suits against a tribe's agents.

See, *e.g.*, *Santa Clara Pueblo*, 436 U.S. at 59 (stating that a tribal officer "is not protected by the tribe's sovereign immunity from suit"); *Department of Taxation & Fin.* v. *Milhelm Attea & Bros.*, 512 U.S. 61, 72 (1994) (explaining that although sovereign immunity bars a suit against the tribe, "damages actions against individual tribal officers" would not be barred). A lawsuit seeking damages from a tribal employee is no more a claim against the tribe itself than a personal-capacity suit against a state or federal employee is a claim against the State or the United States. Accordingly, as the Ninth and Tenth Circuits have correctly recognized, such a claim is not barred by tribal sovereign immunity. See *Pistor* v. *Garcia*, 791 F.3d 1104, 1113 (9th Cir. 2015) ("So long as any remedy will operate against the officers individually, and not against the sovereign, there is no reason to give tribal officers broader sovereign immunity protections than state or federal officers.") (citation and internal quotation marks omitted); accord *Maxwell* v. *County of San Diego*, 708 F.3d 1075, 1088-1090 (9th Cir. 2013); *Native Am. Distrib.* v. *Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296-1297 (10th Cir. 2008).[2]

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[2] Before *Pistor*, some Ninth Circuit cases suggested that tribal sovereign immunity barred any action against a tribal employee arising out of the performance of official duties. See Br. in Opp. 18-22; Pet. App. 11a. But, as the court explained in *Maxwell* and *Pistor*, those cases did not, by and large, consider whether that rule would bar a suit seeking relief against the employee in his personal capacity. *Maxwell*, 708 F.3d at 1089; *Pistor*, 791 F.3d at 1113-1114.

Some decisions of the Tenth Circuit likewise state that the scope of a tribal employee's immunity is coextensive with the scope of his authority. See *Burrell* v. *Armijo*, 603 F.3d 825, 832 (10th Cir. 2010); *Burrell* v. *Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006),

C. Petitioners' Suit Against Respondent Is A Personal-Capacity Suit

1. Petitioners' suit is an action against respondent in his personal capacity. Petitioners' suit seeks to impose *personal* liability on respondent for his alleged negligence—*i.e.*, to recover directly against respondent's own assets. Pet. App. 18a-19a. Accordingly, tribal sovereign immunity does not bar petitioners' claims. See *Hafer*, 502 U.S. at 26-27; *Graham*, 473 U.S. at 165-166; *Scheuer*, 416 U.S. at 237-238.

Respondent has maintained that a judgment against him would functionally run against the Tribe because the Tribe has committed to indemnify him for any adverse judgment. See Pet. App. 34a-35a. But such a voluntary commitment to indemnify does not render the indemnifying sovereign a real party in interest. See *Pistor*, 791 F.3d at 1114 ("Even if the Tribe agrees to pay for the tribal defendants' liability, that does not entitle them to sovereign immunity."); *Maxwell*, 708 F.3d at 1090 ("The unilateral decision to insure a government officer against liability does not make the officer immune from that liability."); see also, *e.g.*, pp. 11-12, *supra*.

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cert. denied, 549 U.S. 1167 (2007); *Tenneco Oil Co.* v. *Sac & Fox Tribe of Indians of Okla.*, 725 F.2d 572, 576 n.1 (10th Cir. 1984) (McKay, J., concurring) (per curiam) (cited at Pet. App. 11a). *Tenneco*, however, involved claims for declaratory and injunctive relief. See 725 F.2d at 574. The *Burrell* case involved damages and appears to treat the suit as a personal-capacity suit. 603 F.3d at 830; 456 F.3d at 1161. But the first *Burrell* decision relied on *Tenneco*, see 456 F.3d at 1174, and the second *Burrell* decision cited *Native American Distributing* without recognizing any tension between its holding and the statement in that case that personal-capacity damages suits are not barred by tribal sovereign immunity. See 603 F.3d at 832.

2. The Connecticut Supreme Court reached the opposite conclusion, holding that sovereign immunity bars all claims against tribal employees for actions carried out within the scope of their employment. See Pet. App. 10a-16a. For that proposition, the court relied, *inter alia*, on *Romanella* v. *Hayward*, 933 F. Supp. 163 (D. Conn. 1996), aff'd, 114 F.3d 15 (2d Cir. 1997), in which a federal district court held that a claim "directly relate[d] to [the defendants'] performance of their official duties" could not be a personal-capacity claim. *Id.* at 168. That holding is directly contrary to the settled rule that what makes a claim an official-capacity claim is "the capacity in which the * * * officer is sued, not the capacity in which the officer inflicts the injury." *Hafer*, 502 U.S. at 26; *Graham*, 473 U.S. at 165-166.[3]

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[3] The Connecticut Supreme Court also relied on the Second Circuit's *per curiam* opinion in *Chayoon* v. *Chao*, 355 F.3d 141, cert. denied, 534 U.S. 966 (2004), for the proposition that a plaintiff cannot circumvent tribal sovereign immunity by naming officers or employees of the tribe as defendants, at least where the complaint concerns actions taken within the scope of their authority. Pet. App. 11a-12a. *Chayoon*, however, relied on precedent involving *official*-capacity suits against tribal officials, see 355 F.3d at 143 (citing *Oneida Indian Nation of N.Y.* v. *City of Sherrill*, 337 F.3d 139, 169 (2d Cir. 2003), rev'd on other grounds, 544 U.S. 197 (2005)), and did not clarify whether its reasoning applied to claims seeking damages against tribal employees personally.

Respondent cites (Br. in Opp. 9, 13) state court decisions for the proposition that tribal sovereign immunity extends to tribal officers acting in their representative capacities and within the scope of their authority. In three of those decisions, the courts drew a distinction between individual- and official-capacity suits. *Inquiry Concerning Complaint of Judicial Standards Comm'n* v. *Not Afraid*, 245 P.3d 1116, 1120 (Mont. 2010); *Wright* v. *Colville Tribal Enter. Corp.*, 147 P.2d 1275, 1280 (Wash. 2006) (en banc),

The Connecticut Supreme Court did not attempt to explain why sovereign immunity should shield tribal employees more broadly than it shields employees of the United States and of the States. To the contrary, the court never acknowledged that its holding deviated from principles governing federal and state sovereign immunity. One district court decision on which the Connecticut Supreme Court relied, see Pet. App. 12a-13a, addressed the deviation between the treatment of tribal and state officers. See *Bassett* v. *Mashantucket Pequot Museum & Research Ctr., Inc.*, 221 F. Supp. 2d 271, 280 (D. Conn. 2002). That court maintained that tribal sovereign immunity should protect tribal employees from personal-capacity suits because state employees have the additional protection of official-immunity defenses when they are sued in their personal capacities. *Ibid.* That reasoning is misguided.

Bassett assumed that tribal employees, unlike state employees, cannot assert an official-immunity defense when sued in their personal capacities. 221 F. Supp. 2d at 280. That assumption, we submit, is incorrect. As explained below, official immunity should be recognized as a matter of federal common law for tribal officers and employees when acting within the scope of their employment, "predicated upon a considered inquiry into the immunity historically accorded the

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cert. dismissed, 550 U.S. 931 (2007); *Wright* v. *Prairie Chicken*, 579 N.W. 2d 7, 11 (S.D. 1998). Others incorrectly concluded that a suit against a tribal official acting within the scope of his employment could not be a personal-capacity suit. *Koke* v. *Little Shell Tribe of Chippewa Indians of Montana, Inc.*, 68 P.3d 814, 817 (Mont. 2003); *Oberloh* v. *Johnson*, 768 N.W.2d 373, 376 (Minn. App. 2009).

relevant official at common law and the interests behind it." *Hafer*, 502 U.S. at 28-29 (citation omitted). Sovereign immunity and official immunity, though reflecting similar concerns, are distinct doctrines having different scopes. See *Scheuer*, 416 U.S. at 239-240. Indeed, the common-law doctrine of official immunity developed specifically because sovereign immunity "did not protect all government officers from personal liability." *Id.* at 239.

In *Hafer*, when rejecting the plaintiffs' argument that constitutional tort liability under 42 U.S.C. 1983 should turn "on the capacity in which [state officials] acted when injuring the plaintiff," the Court explained that such a rule "would absolutely immunize state officials from personal liability for acts within their authority and necessary to fulfilling governmental responsibilities," yet the Court's cases "do not extend absolute immunity to all officers who engage in necessary official acts." 502 U.S. at 27. Similarly here, an Indian tribe's sovereign immunity from suit does not bar personal-capacity suits that would otherwise not be shielded by an official-immunity defense.

II. TRIBAL EMPLOYEES SUED IN THEIR PERSONAL CAPACITIES ARE ENTITLED UNDER FEDERAL COMMON LAW TO OFFICIAL IMMUNITY FROM LIABILITY ARISING OUT OF ACTIONS INVOLVING DISCRETIONARY JUDGMENT

A. Federal Common Law Provides A Defense Of Official Immunity For Government Employees Sued In Their Personal Capacities For Tortious Conduct Occurring In The Scope Of Their Employment

Although sovereign immunity does not bar personal-capacity suits against government employees, the re-

lated federal common-law doctrine of *official* immunity protects government employees against personal-capacity tort suits. That doctrine should likewise apply to tribal employees acting within the scope of their employment outside the tribe's reservation.[4]

1. Because the immunity of the sovereign does not bar personal-capacity suits against the sovereign's employees, the common law gave rise to the personal defense of official immunity. *Scheuer*, 416 U.S. at 239-240. The doctrines of sovereign immunity and official immunity, though not identical in scope or function, both reflect a policy of ensuring that litigation does not unduly interfere with the government's performance of its sovereign duties. As this Court has explained:

> The concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity. While the latter doctrine—that the "King can do no wrong"—did not protect all government officers from personal liability, the common law soon recognized the necessity of per-

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[4] This case does not present any issue concerning torts committed by tribal employees on the tribe's reservation. In that context, it would be necessary to consider tribal tort law and immunities under tribal law applicable to suits against the tribe's employees. See *Williams* v. *Lee*, 358 U.S. 217 (1959). Correspondingly, Connecticut law is the source of both substantive law and applicable immunities in suits against state employees within its borders. See, pp. 31-33, *infra*.

This case also does not present an issue concerning possible preemption of state tort law because of an asserted conflict with a tribe's exercise of governmental functions or its ability to engage in activities supported by federal law.

> mitting officials to perform their official functions free from the threat of suits for personal liability.

Id. at 239.

While sovereign immunity completely bars suits against the sovereign absent the sovereign's consent, the official-immunity defense available in personal-capacity suits does not always provide complete protection. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982); see *Larson*, 337 U.S. at 687 n.7 (contrasting "limitations on the court's jurisdiction to hear a suit directed against the sovereign" with immunity defenses). "[O]fficials whose special functions or constitutional status requires complete protection from suit" are entitled to "absolute immunity." *Harlow*, 457 U.S. at 807. Officials entitled to absolute immunity include "legislators, in their legislative functions," *ibid.* (citing *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975)); "judges, in their judicial functions," *ibid.* (citing *Stump* v. *Sparkman*, 435 U.S. 349 (1978)); "prosecutors and similar officials," *ibid.* (citing *Butz* v. *Economou*, 438 U.S. 478, 508-512 (1978)); "executive officers engaged in adjudicative functions," *ibid.* (citing *Butz*, 438 U.S. at 513-517); and the President of the United States, *ibid.* (citing *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982)).

The Court has also recognized an absolute "defense by officers of government to civil damage suits for defamation and kindred torts." *Barr* v. *Matteo*, 360 U.S. 564, 569 (1959) (opinion of Harlan, J.) (holding that agency director was entitled to absolute privilege against libel claim based on press release). Central to the Court's rationale in doing so was the discretionary judgment inherent in a government officer's decision to make a public statement, and the necessity of such

discretion to the effective functioning of government. See *id.* at 574-575 ("We think that under these circumstances a publicly expressed statement of the position of the agency head * * * was an appropriate exercise of the discretion which an officer of that rank must possess if the public service is to function effectively"); *id.* at 576-577 (Black, J., concurring).

Outside the scope of those protected functions, however, government officers and employees have traditionally been protected by a qualified immunity from suit. See, *e.g.*, *Harlow*, 457 U.S. at 808-813 (holding that White House aides could assert only a defense of qualified immunity in a challenge to the legality of their official actions); *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967) (noting that "[t]he common law has never granted police officers an absolute and unqualified immunity"). With regard to state-law negligence actions, this Court held that federal common law immunizes federal employees only from liability arising out of actions that involved the employee's exercise of "discretionary" judgment. *Westfall* v. *Erwin*, 484 U.S. 292, 295-297 (1988).

The Court reasoned in *Westfall* that the limitation of official immunity to actions arising out of an employee's discretionary actions reflects a balance between the benefits and costs of insulating government employees from suit. With respect to benefits, the Court explained, official immunity is intended not "to protect an erring official, but to insulate the decisionmaking process from the harassment of prospective litigation." 484 U.S. at 295. In particular, official immunity seeks to counter the possibility that "the threat of liability will make federal officials unduly timid in carrying out their official duties, and that

effective government will be promoted if officials are freed of the costs of vexatious and often frivolous damages suits." *Ibid.*; see *Doe* v. *McMillan*, 412 U.S. 306, 319 (1973). Thus, the Court explained, "[i]t is only when officials exercise decisionmaking discretion that potential liability may shackle 'the fearless, vigorous, and effective administration of government policies.'" *Westfall*, 484 U.S. at 297 (quoting *Barr*, 360 U.S. at 571) (opinion of Harlan, J.).

The Court also noted the costs of extending official immunity to liability for actions not involving the requisite degree of discretionary judgment. Official immunity, the Court noted, denies compensation to "[a]n injured party with an otherwise meritorious tort claim * * * simply because he had the misfortune to be injured by a [government] official." *Westfall*, 484 U.S. at 295. For that reason, such immunity "is justified only when 'the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens.'" *Id.* at 295-296 (quoting *Doe*, 412 U.S. at 320). Where official conduct does not involve discretionary judgment, the Court concluded, federal common law does not confer immunity. *Id.* at 297-298.[5]

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[5] The scope of immunity under federal common law in the domestic context differs from that of officials of foreign governments in suits in U.S. courts, discussed in note 1, *supra*. As a general matter, under principles of customary international law accepted by the Executive Branch, certain foreign officials enjoy absolute immunity from all suits and others enjoy immunity from suits for acts taken in an official capacity, not only for discretionary acts. See U.S. Amicus Br. at 10, *Samantar* v. *Yousuf*, 560 U.S. 305 (2010) (No. 08-1555); see, *e.g.*, *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897); *Jones* v. *LeTombe*, 3 U.S. (3 Dall.) 384, 385 (1798). The broader scope of foreign official immunity reflects its relation

2. Although federal common law has provided federal employees with official immunity from tort liability only for actions involving the exercise of discretion, Congress by statute has provided federal employees with additional protections.

a. Congress's first step in protecting federal employees from personal liability was in its enactment in 1946 of the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680. The FTCA waives the United States' sovereign immunity from damages claims based on "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). In enacting the FTCA, Congress sought to supplement the right to sue government employees personally that already existed at common law. See *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong. 2d Sess. 25 (1942) (*House Hearings*) (statement of Assistant Attorney General Francis Shea) ("That the aggrieved person has a right to sue the Government employee is not a sufficient answer because not infrequently the employee * * * is not financially capable of meeting a sizable judgment, and as a rule, the loss or injury occurs in situations in which the Government should in all conscience bear the responsibility.").

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to the Nation's conduct of foreign relations, the role of the Executive Branch in articulating the scope of and suggesting immunity, and principles of international law. Those considerations have no application to the immunity of Indian tribal officials.

The FTCA's judgment bar, however, furnished some protection to individual employees by providing that a judgment in an FTCA suit against the United States is a "complete bar" to "any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676; see *Simmons* v. *Himmelreich*, 136 S. Ct. 1843 (2016). By making the United States liable for its employees' torts and including the judgment bar, the FTCA sought to cut down on the large number of suits against federal employees that were allowed to proceed under the common law—including myriad suits for damages arising out of federal employees' negligent operation of motor vehicles. See *House Hearings* 9 (testimony of Assistant Attorney General Francis Shea) (explaining that "the Government, through the Department of Justice, is constantly being called on by heads of the various agencies to go in and defend" federal employees sued in negligence for injuries caused by operation of a motor vehicle within the scope of their duties); see also *Dalehite* v. *United States*, 346 U.S. 15, 29 n.21 (1953).

b. Because the FTCA did not foreclose tort plaintiffs from suing federal employees, such suits continued to proceed in spite of the judgment bar. The continued frequency of tort suits against federal drivers in particular, see, *e.g.*, *Government Emps. Ins. Co.* v. *Ziarno*, 273 F.2d 645, 648-649 (2d Cir. 1960), led Congress in 1961 to enact the Federal Drivers Act, Pub. L. No. 87-258, 75 Stat. 539. That act made an FTCA suit against the United States the exclusive remedy for "damage to property or for personal injury, including death, resulting from the operation by any em-

ployee of the Government of any motor vehicle while acting within the scope of his office or employment." *Ibid.* Congress subsequently enacted similar protections for physicians and other health-care personnel employed by various federal agencies—in each case by making an FTCA suit against the United States the exclusive remedy. See 10 U.S.C. 1089; 22 U.S.C. 2702; 38 U.S.C. 7316; 42 U.S.C. 233; 51 U.S.C. 20137. Those statutory protections were a direct response to decisions holding that health-care personnel were not protected by the common-law official-immunity doctrine. See, *e.g.*, *Jackson* v. *Kelly*, 557 F.2d 735 (10th Cir. 1977); *Henderson* v. *Bluemink*, 511 F.2d 399 (D.C. Cir. 1974).

Finally, in 1988, Congress passed the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563, following this Court's articulation of the limitations on common-law official immunity in *Westfall* v. *Erwin*. The Westfall Act makes an action against the United States under the FTCA the exclusive remedy for all claims of "injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. 2679(b)(1).[6]

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[6] Connecticut provides similar protection to its employees. See Conn. Gen. Stat. Ann. § 4-165(a) (West 2014) ("No state officer or employee shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his or her duties or within the scope of his or her employment. Any person having a complaint for such damage or injury shall present it as a claim against the state under the provisions of this chapter.").

B. Tribal Employees Sued In Their Personal Capacities Are Entitled To Official Immunity For Discretionary Actions Within The Scope Of Their Employment

1. The same concerns that justified recognition of official immunity for federal employees justify affording official immunity to tribal employees as a matter of federal common law.[7] A tribe's ability to exercise its governmental powers effectively, like that of the federal government, depends on the freedom of its employees to exercise "independent judgment." *Westfall*, 484 U.S. at 296. The threat of state-law liability —like other forms of undue interference—may compromise employees' exercise of independent judgment, just as it may for federal employees. See *ibid.* In such cases, "the fearless, vigorous, and effective administration of policies of government" suffers. *Id.* at 297 (citation omitted). Thus, both the respect owed to tribal sovereignty and self-government, see *Bay Mills*, 134 S. Ct. at 2030, and the policies of federal common law support the defense of official immunity for tribal employees sued under state tort law. See, *e.g.*, *Bay Mills*, 134 S. Ct. at 2032 ("[C]ourts will not lightly assume that Congress * * * intends to undermine Indian self-government.").

2. The scope of official immunity afforded to tribal employees sued in their personal capacities for torts committed in the scope of their employment should conform to the federal common-law immunity this Court recognized for federal employees. For tribal

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[7] This Court has recognized federal common-law defenses to state causes of action in a variety of contexts in which important federal interests are implicated—including in the *Westfall* decision itself. 484 U.S. at 296-297; see, *e.g.*, *Boyle* v. *United Techs. Corp.*, 487 U.S. 500 (1988).

officials acting in a legislative, judicial, prosecutorial, or adjudicative capacity, absolute immunity should apply. See p. 20, *supra*. With respect to tort liability based on allegations of negligence, federal common law immunizes government employees only for actions involving the exercise of discretionary judgment. *Westfall*, 484 U.S. at 295-298. In *Westfall*, this Court specifically rejected the contrary view of some courts that "conduct within the outer perimeter of an official's duties is automatically immune from suit" as a misreading of *Barr* v. *Matteo*. 484 U.S. at 298 n.4. The Court explained that *Barr* repeatedly pointed to "the discretionary nature" of the challenged act, and that "*Barr* did not purport to depart from the widely followed common-law rule that only discretionary functions are immune from liability." *Ibid.* (citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 1059-1060 (5th ed. 1984)); accord Restatement (Second) of Torts § 895D(3)(a) (2016).[8]

3. That federal employees now enjoy complete *statutory* immunity from tort liability under the Westfall Act does not mean that *common-law* official immunity

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[8] As the United States explained in its amicus brief (at 18-21) in *Nevada* v. *Hicks*, 533 U.S. 353 (2001) (No. 99-1994), a parallel official immunity should also be recognized as a matter of federal common law in tribal-law tort suits against state and local employees for law-enforcement and other activities within the scope of their employment within an Indian reservation. Federal law contemplates and sometimes effectively requires that state officers act within a reservation, *e.g.*, in enforcing state criminal law in a State that has assumed law enforcement responsibilities under Public Law 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. 1162, 25 U.S.C. 1321 *et seq.*, and 28 U.S.C. 1360)), and they should be protected by official immunity under federal law in doing so.

has correspondingly broadened. To the contrary, Congress would have had no need to pass the Westfall Act or any of the earlier immunity statutes for drivers and health-care personnel if federal common law (or, indeed, the sovereign immunity of the United States) did not leave federal employees exposed to certain kinds of tort suits. Cf. *Westfall*, 484 U.S. at 299-300.

Moreover, although the Westfall Act displaces federal common-law official immunity for federal employees, it does not alter the scope of the common-law defense where that defense still applies—for example, in cases involving federal contractors or other persons who are not federal employees but perform government functions. In such cases, courts continue to apply the defense described in the *Westfall* decision. See, *e.g.*, *Murray* v. *Northrop Grumman Info. Tech., Inc.*, 444 F.3d 169, 174 (2d Cir. 2006); *Midland Psychiatric Assocs., Inc.* v. *United States*, 145 F.3d 1000, 1004-1005 (8th Cir. 1998); *Beebe* v. *Washington Metro. Area Transit Auth.*, 129 F.3d 1283, 1289 (D.C. Cir. 1997); *Mangold* v. *Analytic Servs., Inc.*, 77 F.3d 1442, 1447 n.4 (4th Cir. 1996). "Despite the changes wrought by the Westfall Act, it is well established that *Westfall* still articulates the more restrictive federal common-law rule limiting official immunity to discretionary conduct." *Midland Psychiatric Assocs.*, 145 F.3d at 1005. Accordingly, in the absence of an Act of Congress granting a broader immunity, the scope of official immunity for tribal employees should be governed by the federal common law of official immunity, reflecting the balance recognized by this Court in its *Westfall* decision between the benefits and costs of immunity. See pp. 21-22, *supra*.

It is significant in this regard that complete statutory immunity from tort liability for federal employees provided in the Westfall Act (and earlier statutes shielding federal drivers and health-care personnel) is coupled with a waiver of sovereign immunity so that injured plaintiffs may bring tort suits arising out of those employees' actions against the United States itself. See pp. 24-25, *supra*. Expanding the common-law defense of official immunity for tribal employees to include all torts committed within the scope of employment would, in contrast, bar all state-law tort suits against tribal employees—even for negligence claims arising from off-reservation automobile accidents —without assuring an alternate avenue for relief against the sovereign. Although Congress could provide an alternative avenue of relief for such plaintiffs through an abrogation of tribal sovereign immunity in state court, *e.g.*, *Kiowa*, 523 U.S. at 759, it has not done so.

It is also significant that Congress *has* acted to confer absolute immunity on tribal employees in certain circumstances not present here. And in doing so it has coupled that immunity with a substitution of liability against *the United States* under the FTCA. Congress has so provided for all tribal employees performing functions assumed by a tribe pursuant to contracts with the Department of the Interior and the Department of Health and Human Services under the Indian Self-Determination Act (ISDA), 25 U.S.C. 5321 *et seq.*, as well as programs carried on pursuant to compacts with those Departments under their Self-Governance Programs, 25 U.S.C. 5361-5399. See Department of the Interior and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-512, Tit. III,

§ 314, 104 Stat. 1959. Congress has furnished a similar immunity to tribal (and state) law enforcement personnel who assist Bureau of Indian Affairs law enforcement personnel pursuant to an agreement entered into under the Indian Law Enforcement Reform Act, 25 U.S.C. 2801 *et seq.* See 25 U.S.C. 2804(f). The substitution of the United States for the individual tribal employee sued in his personal capacity in such cases would be pursuant to the Westfall Act. Finally, 25 U.S.C. 5321(d) provides parallel protection for tribal medical personnel carrying out contracts with the Indian Health Service pursuant to ISDA by treating them as employees of the Public Health Service under 42 U.S.C. 233(a), which makes an FTCA suit against the United States the exclusive remedy. See *Hui* v. *Castaneda*, 559 U.S. 799 (2010).

The fact that Congress has acted to confer absolute immunity on tribal employees in certain circumstances, and coupled that immunity with the availability of a suit against the United States under the FTCA in federal court, reinforces the conclusion that courts should not expand common-law immunity to cover non-discretionary activities of tribal employees in the absence of an Act of Congress.[9]

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[9] In its amicus brief in *Nevada* v. *Hicks*, 533 U.S. 353 (2001), the United States did not propose to define the precise scope of official immunity that should be available to tribal (and state) officials under federal common law. The brief stated that the scope of that immunity "may appropriately be informed by the scope of the immunity available to federal officers in similar circumstances under the Constitution, federal common law, and federal statutes," citing the Westfall Act in a footnote. U.S. Br. at 21 & n.14, *Nevada* v. *Hicks* (99-1994). That brief did not say that the immunity should necessarily have the scope afforded by the Westfall Act; otherwise, there would have been no occasion to refer to federal common law

The Tribe has waived the Gaming Authority's sovereign immunity and consented to suit under the Mohegan Torts Code for injuries arising out of actions of its employees, including for off-reservation torts, in the Mohegan Gaming Disputes Court. Mohegan Tribal Code, Ch. 3, Art. IV, §§ 3-248(a), 3-250(b). But the existence of that waiver of sovereign immunity in tribal court in this case cannot expand the scope of a generally applicable official-immunity defense for all tribal employees acting within the scope of their employment.

In light of that waiver of sovereign immunity allowing suits against the Gaming Authority, it appears that the Tribal Code makes the Gaming Authority, not individual employees, the proper defendant in a suit based on actions within the scope of their employment. See *Boskello* v. *Mohegan Tribal Gaming Auth.*, 12 Am. Tribal Law 242, 243-244 (Mohegan GDTC 2013). The State of Connecticut has similarly waived its immunity from suit and concomitantly conferred immunity on its own employees for actions within the

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as also informing the analysis. In briefs filed after *Nevada* v. *Hicks*, the United States, while not taking a definitive position, cited this Court's decision in *Westfall* limiting immunity to discretionary acts and did not affirmatively urge absolute immunity for all tribal employees. See U.S. Br. at 16 n.10, *Young* v. *Fitzpatrick*, 133 S. Ct. 2848 (2013) (No. 11-1485); U.S. Br. at 18, *Kizis* v. *Morse Diesel Int'l, Inc.*, 794 A.2d 498 (Conn. 2002) (No. 16499).

The position of the United States in this brief is informed by (indeed adopts) the scope of federal common-law immunity for federal employees. It is also informed by the Westfall Act and other statutes that couple absolute immunity for federal employees with the substitution of the federal sovereign as a defendant, and Congress's decision to extend immunity under those statutes to certain tribal employees but not to respondent.

scope of their employment, where the conduct was not wanton, reckless, or malicious. See note 6, *supra*. The Connecticut Supreme Court therefore could consider on remand whether considerations of comity, informed by policies of federal Indian law, would warrant recognition of a comparable immunity for employees of the Gaming Authority sued in Connecticut state court for actions within the scope of their employment. The Connecticut Supreme Court could also consider whether considerations of comity would warrant application in state court of damages limitations provided by tribal law.

C. The Connecticut Supreme Court May Consider The Application Of Official Immunity On Remand

The Connecticut state courts addressed only tribal sovereign immunity and did not address the possible defense of official immunity under federal common law, including whether respondent was engaged in a discretionary function at the time of the collision.

The FTCA contains a "discretionary function" exception, which provides that the United States is not liable for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). Cases interpreting that exception have generally treated the choices involved in driving a motor vehicle as not "discretionary" in the operative sense. See, *e.g.*, *United States* v. *Gaubert*, 499 U.S. 315, 325 n.7 (1991); *Dalehite*, 346 U.S. at 57-58. And yet, some types of driving decisions may be sufficiently imbued with policy decisions so as to trigger the purposes of common-law immunity. The Virginia Supreme Court,

for example, has concluded as a matter of state law that a driver may be entitled to immunity when taking on "special risks" while driving, "to effectuate a governmental purpose." *McBride* v. *Bennett*, 764 S.E.2d 44, 47 (Va. 2014); see *id.* at 48 (holding that, under Virginia law, state officers who hit and killed a bicyclist while responding to a domestic-violence call were immune from suit).

If the Court reverses the Connecticut Supreme Court's decision holding that petitioner's suit is barred by tribal sovereign immunity, the Connecticut Supreme Court will be free to consider a claim of official immunity to the extent that issue remains open as a procedural matter in the state courts.

CONCLUSION

The judgment of the Connecticut Supreme Court should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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NOVEMBER 2016

RECORD AND BRIEFS

FILED
DEC 21 2016

No. 15-1500

In the Supreme Court of the United States

BRIAN LEWIS, ET AL.,

Petitioners,

v.

WILLIAM CLARKE,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

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QUESTION PRESENTED

Whether the sovereign immunity of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment.

JOINDER OF NATIONAL CONGRESS OF AMERICAN INDIANS, *et al* AMICI BRIEF

The States of Arizona and Oregon join in full and adopt the amici curiae brief submitted today in support of Respondent by the National Congress of American Indians, the States of Texas, New Mexico and Colorado, and the Navajo Nation, the Ute Mountain Ute Tribe, the Fort Belknap Indian Community, the Confederated Tribes of the Umatilla Indian Reservation and the Confederated Salish and Kootenai Tribes (the "Government Perspectives Brief").[1]

Like the States of Texas, New Mexico Colorado, which earlier signed on to the Government Perspectives Brief, Arizona and Oregon routinely interact on a government-to-government basis with tribes resident in those states and also with tribes outside their borders and respectfully submit this brief for the reasons provided by those states in their Statement of the Interests of Amici Curiae. The States of Arizona and Oregon join as "Amici States," as that term is defined in the Government Perspectives Brief at page 3.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that no person or entity other than *amici curiae* and their counsel authored this brief in whole or in part. The Amici States file as of right under Rule 37(4).

Respectfully submitted,

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QUESTION PRESENTED

Whether the sovereign immunity of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment.

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STATEMENT OF INTEREST[1]

The Connecticut Trial Lawyers Association ("CTLA") and the American Association for Justice ("AAJ"), formerly the Association of Trial Lawyers of America, as *amici curiae* respectfully submit this brief in support of the Petitioners.

The CTLA is a non-profit association with approximately 1174 members predominantly of the plaintiff's bar practicing in Connecticut. The CTLA is dedicated to creating and maintaining a more just society by preserving individual rights within the justice system to achieve the following goals: (1) Ensure that the civil justice system works for all people; (2) Hold wrongdoers accountable regardless of their corporate, government, association or individual status; (3) Protect consumer rights and safeguard the environment; (4) Advance the cause of those whose person or property is injured or damaged; (5) Preserve and protect access to the courts and jury system of this state and this nation; and (6) Uphold the honor and integrity of the profession of law.

The AAJ is a non-profit advocacy and lobbying organization for plaintiffs' lawyers in the United States. It provides trial attorneys with information, professional support and a nationwide network that enables them to most effectively and expertly represent clients. Specifically, the AAJ is comprised of trial attorneys who are committed to ensuring that all

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties consented in writing to the filing of this *amici curiae* brief.

people—individuals, families, patients, workers and consumers—can seek justice in our nation's courtrooms. The mission of the AAJ is to promote a fair and effective justice system—and to support the work of attorneys in their efforts to ensure that any person who is injured by the misconduct or negligence of others can obtain justice in America's courtrooms.

This Case touches upon several of the vital goals of both the CTLA and the AAJ. Critical to the mission of both organizations is the notion that *all* individuals whose person or property has been injured should be able to seek a just remedy in our nation's courtrooms. The access, fairness and effectiveness of our civil justice system depends upon it. Moreover, members of both the CTLA and the AAJ work tirelessly each day to protect and preserve it. Their clients depend on their expertise and guidance as they navigate the court system, and the question of whether a tribal employee may be pursued for alleged tortious wrongdoing is directly relevant to (1) whether CTLA and AAJ members are able to effectively represent their clients, and (2) whether *all* of their clients will have equal and fair access to seek justice in our nation's civil courtrooms.

Because the Supreme Court of Connecticut's decision in this matter extends sovereign immunity to tribe employees who commit tortious acts and are sued individually, it will leave many individuals whose person or property has been injured by those employees without a remedy and therefore without access to the justice system. This is an unacceptable outcome. Based upon these strong interests in the access to and fairness of our nation's courts, the CTLA and AAJ

jointly urge this Court to hold that a tribe's sovereign immunity does *not* extend to its employees for individual liability in tort. The judgment of the Connecticut Supreme Court should be reversed and the matter remanded for further proceedings.

SUMMARY OF ARGUMENT

The question before this Court concerns the scope of tribal sovereign immunity over a tribe employee sued individually for negligent and tortious actions that caused severe injury upon unsuspecting persons. This question raises issues concerning the fundamental right of individuals whose person or property has been injured to seek redress for their injuries and to access our nation's courts in exercise of that right. If, as the Connecticut Supreme Court concluded, tribal immunity is expanded to shield a tribe employee from liability in his individual capacity for his negligent and injurious actions, the injured party is left without a remedy in our State courts. This result is unjust and unacceptable, and must be reversed.

The Connecticut Supreme Court's decision does more than offend the basic right of injured persons to seek redress in our nation's courts. In so doing, it also improperly expands the doctrine of tribal immunity beyond the principles of sovereign immunity that shield both States and the federal government, which are not limitless and which permit lawsuits against officers *in their personal and individual capacities*. There is no reason why this case, based in simple negligence against the Respondent in his individual capacity for injuries stemming from a car accident that he negligently caused, justifies a rule by which tribal

immunity is extended to shield tribe employees to a greater degree than State and federal officials. If anything, it demonstrates why tribal immunity should *not* be so extended: the Petitioners did not and could not have anticipated that they would be involved in a traumatic car accident caused by someone else's negligence and they did nothing to subject themselves to the sovereignty of the tribe. To preclude them from filing suit against the individual who caused the car accident simply because of the nature of that individual's employment is patently unfair and actually *furthers* their harm. *See Kiowa Tribe of Oklahoma v. Mfg. Technologies., Inc.*, 523 U.S. 751, 754 (1998) ("immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims").

The critical point to consider is that this Court's resolution of this question will create a rule affecting *all* persons across this country who find themselves victim to a tribe employee's negligence, regardless of which tribe that employee works for, where the tribe is located, or what, if any, limited remedies are offered by the tribe. Because the right to seek justice and access our nation's courts is absolute and should not rise and fall with the identity of an individually-named tortfeasor's employer, the judgment of the Connecticut Supreme Court to the contrary must be reversed and the matter remanded for further proceedings.

ARGUMENT

I. THE CONNECTICUT SUPREME COURT'S DECISION WILL LEAVE PERSONS WHO ARE INJURED BY TRIBE EMPLOYEES WITHOUT A REMEDY AND MUST BE REVERSED.

The Connecticut Supreme Court improperly concluded that tribal sovereign immunity extends to include the Petitioners' tort claims against the Respondent tribal employee in his individual capacity. That Court so held because (1) the Respondent was an employee of the tribe, and (2) he was acting within the scope of his employment when the accident that injured the Petitioners occurred. Pet. App. 16a. That Court held that the Petitioners therefore were precluded from pursuing their claims for damages in Connecticut state court against the Respondent individually. *Id.* at 16a-17a. That Court's decision leaves the Petitioners with no remedies in State court for the injuries they suffered on Connecticut roads due to the Respondent's individual negligence. The law should not permit the Respondent to use the sovereign immunity of a tribe for which he is merely employed as a shield from any liability stemming from his individual negligence against others. This result is contrary to the administration of justice in our nation's courts, to the States' rights to provide civil remedies for their tort victims, and to the notion that *all* individuals whose person or property has been injured should be able to seek redress. This decision cannot stand.

Tribal sovereign immunity finds its roots in tribal sovereignty. It is undisputed that "Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government." *Santa Clara Pueblo v. Martinez*, 436

U.S. 49, 55 (1978) (internal citations and quotation marks omitted). It is also undisputed that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* at 58; *see also Michigan v. Bay Mills Indian Community*, __ U.S. __, 134 S.Ct. 2024, 2030 (2014). "[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma*, 523 U.S. at 754. Any waiver of sovereign immunity must be unequivocally expressed. *Santa Clara Pueblo*, 436 U.S. at 58; *see also F.A.A. v. Cooper*, __ U.S. __, 132 S.Ct. 1441, 1448 (2012).

However, that immunity is not without its limits. Tribal sovereign immunity does not always extend to suits against individual tribe members, for example. "[W]hether or not the Tribe itself may be sued in a state court without its consent or that of Congress, a suit to enjoin violations of state law by individual tribal members is permissible." *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165, 171 (1977); *see also Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) ("Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State."). This is similar to well-established principles governing the limitations on States' sovereign immunity to State officials sued in their individual capacity. *Ex Parte Young*, 209 U.S. 123 (1908) (if a state official violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct; the State cannot cloak the individual in sovereign immunity); *see also Alden v. Maine*, 527 U.S. 706, 757 (1999) ("Even a suit for money damages may be prosecuted against a state officer in his individual capacity for

unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally."). Mere employment alone is an insufficient basis upon which to decide the application of sovereign immunity.

Yet, mere employment is the only basis upon which the Connecticut Supreme Court relied in extending tribal immunity to the Respondent in this case. There is no dispute that the Respondent is named individually. Pet. App. 3a. He was driving on Connecticut roads, off tribal lands, when he is alleged to have negligently caused an accident resulting in injuries to others. *Id.* at 2a.

That the Respondent was working for, and driving a vehicle belonging to, an Indian tribe at the time that his negligent act occurred is not a sufficient basis for a finding of tribal immunity and the dismissal of the suit. The fact of his employment at the time, or the ownership of the car, however, is only relevant for the purposes of vicarious liability under Connecticut law,[2] which would allow a plaintiff to sue the employer for the actions of the employee made in the course of his employment. Here, of course, vicarious liability ultimately was not at issue. Although initially bringing suit against both the Respondent and his employer, the Mohegan Tribal Gaming Authority ("MTGA"), an

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[2] Connecticut General Statutes § 52-183 provides in relevant part: "In any civil action brought against the owner of a motor vehicle to recover damages for the negligent or reckless operation of the motor vehicle, the operator, if he is other than the owner of the motor vehicle, shall be presumed to be the agent and servant of the owner of the motor vehicle and operating it in the course of his employment. The defendant shall have the burden of rebutting the presumption."

arm of the Mohegan Tribe of Indians of Connecticut, the Petitioners voluntarily dismissed the MTGA as a defendant and filed an amended complaint against only the Respondent. Pet. App. 3a.

The case as it remained, then, was one of simple negligence by the Petitioners against the Respondent in his individual capacity. The Indian tribe, by way of the MTGA, was not involved as a party, nor would it be liable for any judgment. Yet, the Respondent claimed that the Petitioners' claims were barred under the doctrine of tribal sovereign immunity because the complained-of actions arose in the course of his employment with the MTGA. Pet. App. 22a. The Connecticut Supreme Court, agreeing with the Respondent, *extended* tribal sovereign immunity to shield him from liability, dismissing the Petitioners' suit. *Id.* at 16a-17a. The Court based its holding on the simple fact that the Respondent was an employee of the tribe and was acting within the scope of his employment when the accident occurred. *Id.* ("the plaintiffs cannot circumvent tribal immunity by merely naming the defendant, an employee of the tribe, when the complaint concerns actions taken within the scope of his duties and the complaint does not allege, nor have the plaintiffs offered any other evidence, that he acted outside the scope of his authority"). The only basis for the application of tribal immunity in this case was the nature of his employment at the time of the accident. That is not enough to warrant the extension of tribal immunity to a defendant sued for his own individual negligence.

Case law and prudent policy reasons do not support the Connecticut Supreme Court's extension of tribal immunity over a tribe employee *sued in his individual capacity*. The relief sought, significantly, is against

the individual employee himself, and not the tribe. The money damages claimed would come from the employee personally and not the tribe and its members. Accordingly, the tribe is not implicated in any capacity and is not "the real, substantial party in interest." *Maxwell v. County of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013) (quoting *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459, 464 (1945)). Tribal immunity should not extend to shield employees who are sued in their individual capacity, regardless of whether they are sued for simple or gross negligence, as *they alone are implicated* in either case. Such a rule gives persons who are injured by a tribe employee guidance, reliability and consistency in pursuing their claims for damages. Moreover, and perhaps more to the point, such a rule gives persons who are injured by a tribe employee an opportunity to seek damages in the first place.

The holding of the Connecticut Supreme Court, on the other hand, eliminates any such opportunity because it expands the scope of tribal sovereign immunity far beyond other comparable immunities applicable to States and the federal government. Each State is "a sovereign entity in our federal system," and thus is inherently immune from suit. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996). Yet, as noted earlier, injured persons may file a suit for money damages against a State officer in his individual capacity for wrongful or negligent conduct attributed to the State officer himself, as long as the relief requested is from the officer personally. *Alden*, 527 U.S. at 757. In that same vein, the United States is shielded by sovereign immunity from suit in the absence of an express statutory waiver. *U.S. v. Bormes*, __ U.S. __, 133 S.Ct. 12, 15-16 (2012). Yet this Court has acknowledged that exceptions exist that

permit, for example, a cause of action against individual federal officers for certain constitutional violations. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *see* Pet. Cert. at 17-18. Neither State nor federal sovereign immunities are limitless and both permit lawsuits against officers *in their personal and individual capacities*.

There is no legal or policy basis for extending the doctrine of tribal sovereign immunity beyond the principles of sovereign immunity that shield both States and the federal government. As this Court recently has acknowledged: "Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Bay Mills*, __ U.S. at __, 134 S.Ct. at 2030. It is critical that these sovereign powers *continue* to share these principles, and that they not be treated differently or be extended and limited in different ways. *See Bay Mills*, __ U.S. at __, 134 S.Ct. at 2042 (noting that States and Tribes should *not* be treated differently for purposes of sovereign immunity and that "comity would be ill-served by unequal treatment of States and Tribes") (Sotomayor, J., concurring). This extension of sovereign tribal immunity by the Connecticut Supreme Court created precisely this difference in scope of immunity. Such difference cannot stand.

In addition to extending the scope of tribal sovereign immunity, the Connecticut Supreme Court's holding severely limits the rights of persons injured by the negligence of a tribe employee to pursue that employee in search of a damages remedy. As members of the CTLA and AAJ know very well, persons who are injured rely on state tort law in order to seek redress for their injuries. This principle is well settled and,

indeed, serves as the bedrock of our society. *See, e.g.*, *Carey v. Piphus*, 435 U.S. 247, 254-55 (1978) ("The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty.") (quoting 2 F. Harper & F. James, Law of Torts § 25-1, p. 1299 (1956) (emphasis in original)); *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government."). Yet if tribal immunity is extended to include a tribe's employees, there will be no recovery for persons who are injured by the tortious actions of those employees. This conclusion is at odds with this Court's recognition that "[u]nless federal law provides differently, Indians going beyond reservation boundaries are subject to any generally applicable state law." *Bay Mills*, __ U.S. at __, 134 S.Ct. at 2034 (internal quotation marks omitted). It also is counterintuitive to the notion that tribal immunity does not bar "a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct," *id.* at 2035 (emphasis omitted). Individual tribe employees are subject to the criminal laws of each State, regardless of tribal immunity.[3] They should likewise be subject to the tort laws of each state when acting in their individual capacity.

It is critical to the fairness and administration of justice in our nation's courts that persons injured are able to seek redress. In this case, the Petitioners were merely driving down the highway, miles away from

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[3] In fact, the Respondent in this case was cited for violating C.G.S. § 14-240 for following a vehicle too closely. Resp. Conn. Super. Ct. Mot. to Dismiss, Ex. B (Dec. 31, 2013).

the tribe's reservation and in the opposite direction, when the Respondent negligently drove his limousine into the rear of their car, injuring them and pushing their car to rest partially on top of the concrete barrier on the side of the highway. Pet. App. at 2a. They did not and could not have anticipated that they would be involved in such a traumatic car accident at the hand of someone else's negligence or that the person whose negligent actions caused the accident would be employed by an Indian tribe and possibly shielded by tribal immunity. They did nothing to subject themselves to the sovereignty of the tribe. Rather, as motorists on Connecticut state roads, their expectations undoubtedly were that Connecticut tort laws would apply. *See* Restatement (Second) of Conflict of Laws §145(1) (1971) ("[t]he rights and liabilities of the parties with respect to an issue [in tort] are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6"). To preclude them from filing suit against the individual who caused the car accident simply because of the nature of his employment is patently unfair, contrary to the well-settled principles of tort law and an unnecessary and impermissible extension of tribal immunity beyond its sovereignty. *See Kiowa Tribe of Oklahoma*, 523 U.S. at 758 ("immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims").

It is true that some tribes choose to waive immunity to allow tort suits. But this waiver is not guaranteed, it is not consistent, and it is not coextensive in scope with other existing law. In Connecticut, for example,

there are two federally recognized tribes,[4] and both offer different—and severely limited—remedies and rights than the state judicial system. For example, their tribal laws do not provide for a right to a jury trial in tort actions;[5] 12 Mashantucket Pequot Tribal Laws ch. 1 § 5; Mohegan Tribe of Indians of Conn. Code art. 4 § 3-248(d); carry only a one-year statute of limitations; 12 M.P.T.L. ch. 1 § 4(a)(2); Mohegan Tribe Code art. 4 § 3-246(a); and limit the amount of damages; 12 M.P.T.L. ch. 1 § 2(b); Mohegan Tribe Code art. 4 § 3-251(a). These remedies are in sharp contrast to the remedies under Connecticut state law, where plaintiffs have the right to a trial by jury; Conn. Const. art. 1, § 19; where there is a longer statute of limitations on tort claims; Connecticut General Statutes §§ 52-577, 52-555 & 52-584; and where there is no limit on damages; C.G.S. § 52-572h.

Significantly, not all tribes offer such limited remedies in tort, either. Many offer no tort claim procedure at all, and many do not maintain tribal courts. Such limited remedies therefore are created at the whim of each tribe and vary dramatically across the country. This inconsistency is unreliable and provides *no* guidance for persons who are injured by a tribe employee. *See* Pet. Br. at 28. Moreover, this Court's decision will result in a rule that applies nationally. Because of this, it should render a decision that provides *all* injured persons with the right to access a remedy in our courts, not merely those who were injured by a

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[4] They are the Mohegan Tribe of Indians of Connecticut and the Mashantucket Pequot Tribal Nation.

[5] Like the right to access to the courts, the fundamental right to a civil jury trial is one that has a long and evolved history in our country. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

tribe employee working for a tribe that maintains a limited tort claim procedure. An injured person's rights to redress from an individual acting negligently should not rise and fall based on the random happenstance of who employs such individual.

To that end, this Court must continue to protect the constitutional right of access to the courts and right to redress for injury that has become a bedrock principle of Anglo-American society. This Court has "grounded the right of access to courts in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection, and Due Process Clauses." *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (internal citations omitted). At least forty states protect, through their constitutions, an individual's right to a remedy. *See* Thomas R. Philips, *The Constitutional Right to a Remedy*, 78 N.Y.U.L.R. 1309, 1310 n.6 (2003); *see also* Conn. Const. art. 1, § 10.

Access to courts requires more than merely open doors. *See Tennessee v. Lane*, 541 U.S. 509, 533 (2004) (requiring state courts to make accommodations allowing disabled persons equal physical access to the courts). The right encompasses the "meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). "The fundamental requisite of due process law is the opportunity to be heard." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). In a civil personal injury action, the meaningful opportunity to be heard includes the determination of liability and damages for the tortfeasor's wrong. *See Carey v. Piphus*, 435 U.S. 247, 254-55 (1978) ("The cardinal principle of damages in

Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty.") (emphasis in original) (citation omitted).

The Connecticut Supreme Court's decision in this case destroys the Petitioners' right to *any* opportunity—nevermind any *meaningful* opportunity—to be heard in a State court in pursuit of their claim for damages caused by the Respondent's negligent acts. Their access to our nation's courts effectively has been foreclosed. This result is both unjust and antithetical to the constitutional right to access our courts. This Court now has the opportunity to remedy this wrong and reverse the underlying judgment, in turn protecting the rights of injured persons across our nation. It should do so.

This is not a case about the retention of tribal sovereignty, but rather it is a judicially-based extension of such immunity beyond that intended by Congress and precedent. Tribal immunity, like all sovereign immunity, is based on the need to safeguard a tribe's self-governance. A suit against a tribe's employee seeking individual liability for his negligence does not impact that sovereignty. This extension of tribal immunity to shield a tribe's employee from liability for his negligent actions constitutes an unwarranted and improper expansion of tribal immunity that unfairly blocks an injured plaintiff's access to our justice system. The Connecticut Supreme Court's decision perpetuates this severe injustice and cannot stand.

CONCLUSION

Amici curiae Connecticut Trial Lawyers Association and American Association for Justice respectfully urge that the judgment of the Supreme Court of Connecticut be reversed and the matter remanded for further proceedings.

Respectfully submitted,

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November 21, 2016

RECORD
AND
BRIEF

No. 15-1500

In the Supreme Court of the United States

BRIAN LEWIS, ET AL.,

Petitioners,

v.

WILLIAM CLARKE,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

BRIEF *AMICI CURIAE* OF THE NATIONAL CONGRESS OF AMERICAN INDIANS, THE STATE OF TEXAS, THE STATE OF NEW MEXICO, THE STATE OF COLORADO, THE UTE MOUNTAIN UTE TRIBE, THE NAVAJO NATION, THE FORT BELKNAP INDIAN COMMUNITY, THE CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION AND THE CONFEDERATED SALISH AND KOOTENAI TRIBES IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the sovereign immunity of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment.

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INTERESTS OF THE *AMICI CURIAE*[1]

The National Congress of American Indians ("NCAI") is the oldest and largest national organization representing the interests of American Indians and Alaska Natives, with hundreds of tribal governments comprising its membership. Since 1944, NCAI has worked to protect the rights of Indian tribes and to improve the welfare of American Indians and also advised tribal, state and federal governments on a range of Indian issues, including issues of sovereign immunity.

The Navajo Nation, the Ute Mountain Ute Tribe, the Fort Belknap Indian Community, the Confederated Tribes of the Umatilla Indian Reservation and the Confederated Salish and Kootenai Tribes (collectively, the "Amici Tribes") are federally recognized Indian Tribes. The Navajo Nation is the largest Indian nation by land holdings, and, by some measures, the number of enrolled citizens. It has over 300,000 enrolled citizens and over 17 million acres of largely contiguous land in New Mexico, Arizona, and Utah. The Nation is larger than ten of the states and is roughly the size of West Virginia

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that no person or entity other than *amici curiae* and their counsel authored this brief in whole or in part. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission of the brief. Amici States of Texas, New Mexico and Colorado file as of right under Rule 37(4). The parties were notified of the intention of amici curiae to file as required by Rule 37.2 and all parties have consented to the filing of this brief.

and twice the size of Massachusetts. The Nation is a sovereign government with two ratified treaties with the United States, entered into in 1850 and 1868. The Ute Mountain Ute Reservation also covers three states (Colorado, New Mexico and Utah) and some approximately 600,000 acres. The Confederated Salish and Kootenai Tribes reside on the Flathead Reservation covering 1.317 million acres across four counties in Montana, while the Fort Belknap Indian Reservation encompasses another approximately 650,000 acres in Montana and the Umatilla Indian Reservation includes approximately 175,000 acres in Oregon. Each of the Amici Tribes is a large land base tribe, with just the five Amici Tribes representing roughly 20 million acres of reservation land in five states. NCAI represents tribal interests on a national basis involving millions more acres of reservation lands.

The Amici Tribes rely on economic activities, such as gaming and mineral development, for virtually all of their governmental revenue and are located in geographically remote areas where their employees are frequently forced to drive long distances and across state lines on routine business. In terms of both territory and geography, tribes play significant governmental roles in our American federalism. These roles include weighing policy and making sovereign determinations – just as states do – as to whether and how the government manages litigation risk, both as to the government qua government and as to tribal employees. The Navajo Nation has a sovereign immunity act that provides a general waiver of sovereign immunity for tort claims, subject to certain limitations, Navajo Nation Sovereign Immunity Act, 1 N.N.C. §§ 551 *et seq.*, and the Ute

Mountain Ute Tribe frequently enters into agreements that provide waivers of sovereign immunity under specified circumstances, as do the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Salish and Kootenai Tribes and the Fort Belknap Indian Community. Tribes rely on having these waivers enforced as written, in accordance with their dispute resolution provisions and limits.

The States of Texas, New Mexico and Colorado are the "Amici States." Each of the Amici States, like their sister states, routinely interacts on a government-to-government basis with tribes resident in each state and also with tribes outside each state's borders. Their courts routinely enforce or domesticate tribal court judgments and work and coordinate in other ways with tribal judiciaries, to varying degrees. The State of New Mexico provides full faith and credit to tribal court judgments pursuant to state law. Forcing state courts to hear suits against tribal employees when those suits are forbidden by tribal law and the tribe has established an adequate alternative forum is detrimental to the Amici States' interest in developing a functioning relationship with tribal judicial systems, which are often the most appropriate forum to handle matters that are important to the Amici States and their citizens.

These dealings have resulted in numerous intergovernmental agreements, including frequently in the tribal gaming context. In that vein, the Amici States have reached binding agreements that each becomes incorporated into state law. These agreements frequently contain forum exclusivity clauses whereby tribal gaming authorities consent to suit in

a limited fashion, based on concerns similar to those weighed by state governments in determining whether and how to risk potential governmental liability. Each of the Amici States is interested in avoiding any displacement of such bargained-for settled expectations and likewise interested in avoiding the potential burden of litigation unrequired by state law.

The Amici, states and tribes, are united in their position that no policy interest is served by allowing plaintiffs to skirt—with mere pleading devices—carefully considered governmental limitations on suits against government employees, especially when those limitations have been negotiated and embraced in an intergovernmental agreement which constitutes state law. From the perspective of Amici, this is a federalism case, not a sovereign immunity case or an Indian law case. Instead, Amici assert the question presented here is more aptly framed: "Does federal law bar a state's highest court from determining its own jurisdiction and recognizing, as a matter of comity, an Indian tribe's sovereign immunity according to state rather than federal law?" The Amici submit the answer to that question must be "no."

Amici submit that every domestic government has the fundamental authority to control its own liability regime, as the Mohegan Tribe has done with respect to its gaming activities, in accord with the Tribe's compact with the State. In point of fact, the Mohegan Tribe has waived immunity for claims related to its gaming activities, including establishing a forum for relief and enacting statutes of limitation within which claims may be brought. *See* Mohe-

gan Tribe Code of Laws §§ 3-21 *et seq*. Below, Petitioners met neither the forum nor the statute of limitations requirements of Tribal law. Rather, they sought to displace the government's liability regime by dismissing their original untimely claims against the Mohegan Tribal Gaming Authority ("Tribal Authority") and recasting their claims as exclusively individual-capacity claims against the government employee who was undisputedly acting within the scope of his employment. Tort remedies would have been available to Petitioners if they had been appropriately filed. Petitioners' specter of tribal governmental employees running roughshod over non-Indians is a red herring. *Lewis v. Clarke* is a hammer in search of a nail, and has the potential to impose unfunded mandates upon state courts. A change to the status quo—e.g., creating access to state courts for individual-capacity claims against tribal employees otherwise only available in tribal courts—risks creating jurisdictional confusion where none now exists and burdening state courts with costs imposed by forum-shopping plaintiffs like Petitioners.

SUMMARY OF THE ARGUMENT

There is no principle of federal law that requires the courts of Connecticut to take jurisdiction over Petitioners' tort suit.

In the decision below, the Connecticut Supreme Court dismissed a suit against an employee of the Tribal Authority, correctly concluding that "the doctrine of tribal sovereign immunity extends to the plaintiffs' claims against the defendant because the undisputed facts of this case establish that he was an employee of the tribe and was acting within the

scope of his employment when the accident occurred." Pet. App 16a.[2] In reaching this result the Connecticut Supreme Court relied, appropriately, not only on federal cases but also on a Connecticut state case that applied the tort claim provisions of the Mohegan Gaming Code as an exclusive remedy because those provisions were part of the gaming compact approved by the State legislature, Pet. App. 11a (citing *Kizis v. Morse Diesel Int'l, Inc.*, 794 A.2d 498, 503-04 (Conn. 2002)), and on Connecticut's own sovereign immunity laws, which would extend immunity to a Connecticut State employee under similar circumstances. *Id.* at 15a (citing Conn. Gen. Stat. § 4-165) ("[n]o [S]tate officer or employee [of Connecticut] shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his or her duties or within the scope of his or her employment.").

Whether or not this result is mandated by federal law, the Supreme Court of Connecticut has the authority to determine its own jurisdiction under Connecticut state law and to accord the Mohegan Tribe ("Tribe") the traditional comity owed to foreign and domestic governments. *See Nevada v. Hall*, 440 U.S. 410, 425 (1979) (finding that "one State's immunity from suit in the courts of another State is . . . a matter of comity," not a question of federal law).

Tribal immunity "is not subject to diminution by the States." *Kiowa Tribe of Oklahoma v. Mfg. Techs.*,

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[2] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed by Petitioner in this case. The opinion of the Connecticut Supreme Court (Pet. App. 1a-17a) is reported at 135 A.3d 677 (hereinafter "Decision Below").

Inc., 523 U. S. 751, 756 (1998). However, the states remain free to adopt an understanding of tribal sovereign immunity that is more expansive than that dictated by federal law, when considering the jurisdiction of their own courts. Tribal sovereign immunity in state court is not "solely a matter of comity," but that does not mean that comity plays no role at all. *Id.* at 755.

Allowing states to extend their recognition of tribal sovereign immunity beyond the minimum mandated by federal law is consistent with the history and policy of tribal sovereign immunity. The special status of tribal immunity in federal law derives from the fact that tribes were not parties to the Constitution and "were thus not parties to the mutuality of concession that makes the States' surrender of immunity from suit by sister States plausible." *Id.* at 756 (quoting *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 782 (1991)) (internal quotation marks omitted). Nonetheless, Indian tribes have become an important part of our federal system of government and have developed sovereign, intergovernmental relationships with the states.

The application of state comity doctrines and modern, statutory understandings of the scope of sovereign immunity is in keeping with tribes' roles in our legal system and with the establishment of mutually respectful relationships between state and tribal governments and court systems. It is also consistent with this Court's recent decision in *Franchise Tax Board of California v. Hyatt*, 136 S. Ct. 1277, 1282 (2016), which forbids states from discriminating against each other by refusing to accord

sovereign immunity to a defendant state when the forum state would have been immune under the same circumstances.

The Decision Below falls within the authority and jurisdiction of the courts of Connecticut, and there is no federal law that requires reversal.

ARGUMENT

I. THE JURISDICTION OF THE STATE COURTS IS A QUESTION OF STATE LAW, SUBJECT TO THE LIMITS IMPOSED BY FEDERAL LAW AND THE CONSTITUTION.

Petitioners argue that "[t]his Court has held that individual capacity damage actions . . . do not implicate sovereign immunity. . . . [but] [t]he Connecticut Supreme Court . . . created a different rule." Brief for Petitioners at 2. If so, then the Connecticut Supreme Court has acted within the scope of its authority, unless Petitioners can show that there is a federal rule of law that requires a different outcome. "Unless such a federal rule exists, we of course have no power to disturb the judgment of the [Connecticut] courts." *Hall*, 440 U.S. at 418.

This "different rule" created by the Connecticut Supreme Court is simply the rule that would have applied to Connecticut public employees in Connecticut court. *See* Conn. Gen. Stat. § 4-165; *Gordon v. H.N.S. Mgmt. Co.* 861 A.2d 1160, 1175 (Conn. 2004) (finding that a private operator providing bus services on a contract with the State could not be sued for a motor vehicle accident). Although the Connecticut Supreme Court based its decision primarily on federal cases, it observed that this approach, forbidding ordinary negligence suits against public employees, was also consistent with its own statutes

and the laws of other states. Pet. App. 14a-15a. Far from carving out special privileges for tribes, the Decision Below treats them with the same fairness and common sense that a state government would enjoy under similar circumstances.

The Decision Below is entirely consistent with this Court's explanation, which has endured some 126 years, that a government can choose to waive its sovereign immunity and "as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted." *Hans v. Louisiana*, 134 U.S. 1, 17 (1890). Governments understandably limit immunity waivers, including as to public officials and employees, "to protect the public treasuries" and to enable "the government and its various subdivisions to function unhampered by the threat of time and energy consuming legal actions which would inhibit the administration of traditional state activities." *Garcia v. Albuquerque Pub. Sch. Bd. of Ed.*, 622 P.2d 699, 702 (N.M. App. 1981); *see also, e.g., Lister v. Bd. of Regents of Univ. Wisc. Sys.*, 240 N.W. 2d 610, 621 (Wisc. 1976) (listing multiple policy reasons for immunity). For more than a century, state courts have routinely followed that longstanding logic. As explained more fully below, there is nothing unusual about the way the Tribe has limited its governmental exposure via individual capacity actions by employees and moreover, nothing special about Connecticut's deference to the Tribe's establishment of the Mohegan Gaming Disputes Court as the exclusive forum for such claims.

A. Sovereign immunity of governments other than the United States in state court is a question of state law, unless there is a specific federal law that supersedes it.

Under this Court's precedents, the jurisdiction of the state courts, including the jurisdiction of the state courts over other states, their agencies, and their employees is a question of state law. *Hall*, 440 U.S. at 418. Under existing law, when a state is sued in the courts of a different state, "the matter must be determined in two spheres: Federal constitutional law, as to which, ultimately, the United States Supreme Court is the arbiter; and the concept of interstate comity, of which the forum state . . . is the arbiter." *Morrison v. Budget Rent A Car Sys., Inc.*, 230 A.D.2d 253, 264 (N.Y. 1997).

Thus, if a state accords to tribes the same comity that it accords to other states, in considering a motion to dismiss on tribal sovereign immunity grounds, the court must determine that hearing the case would violate neither federal tribal sovereign immunity law nor the laws of the state.

States have taken various approaches to the sovereign immunity of other states: some "have refused to accord sovereign immunity by way of interstate comity, stating simply that their own [s]tate interests favor the assumption of jurisdiction"; others "have declined to extend comity considering that their own statutes afford a lesser degree of immunity—a fuller level of compensation—than does the defendant"; and some employ a choice of law analysis and look at "which [s]tate has the more significant relationship to the parties and the action." *Morrison*, 230 A.D.2d at 267 (N.Y. 1997) (collecting cases).

Some of these approaches will need to be reevaluated in light of *Franchise Tax Board*, 136 S. Ct. at 1283.

What these different approaches have in common is that none of them look to whether the activity in question would have come within the scope of traditional, pre-statutory sovereign immunity as understood by English common law. Instead, courts analyze their own comity doctrines, along with the tort claim statute of the defendant sovereign. More often than not, states accord each other comity. As the State of Texas recently explained, this is because to do otherwise "would simply result in a race-to-the-bottom refusal to apply narrower foreign-state law, which in turn would only promote forum shopping." Brief in Chief for Eldo Frezza, M.D., at 32, *Montaño v. Frezza*, No. S-1-SC-35214 (N.M. Sept. 30, 2015) (case pending).

Reversing the Decision Below would force tribes into an 18th Century understanding of the relationship between sovereign immunity and respondeat superior that has been abandoned through statute by the federal government. Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563. Many states have also abandoned archaic views of individual capacity tort claims against government employees in favor of indemnification of employees and waivers of state sovereign immunity. *See* Brief for Petitioner at 19-20 (collecting state tort claims statutes).

Reversal would allow for an outmoded result even when a state is willing to accord sovereign immunity and the tribe has adopted a modern tort claims act that applies to the type of claim at issue. Mohegan Tribal Code, Ch. 3, Art. IV, §§ 3-245(a), 3-250(b). The outcome requested by Petitioners will only serve

to discourage tribes from adopting tort claims acts, because they would be forced to pay damages under the waiver of sovereign immunity but would not be able to provide any corresponding protections to their employees. The outcome would also result in forum-shopping, unnecessarily burdening state courts.

This outcome would also be inconsistent with the logic of *Franchise Tax Board*, where this Court held that a forum state must honor the defendant state's sovereign immunity laws up to the point where the forum state would be entitled to immunity under its own laws, to avoid evincing a "policy of hostility to the public Acts of a sister State." 136 S. Ct. at 1279 (citing U.S. Const., Art. IV, § 1 (Full Faith and Credit Clause)). "A constitutional rule that would permit this kind of discriminatory hostility is likely to cause chaotic interference by some [s]tates into the internal, legislative affairs of others." *Id.* at 1282. *Franchise Tax Board* is rooted in the Full Faith and Credit Clause, but its logic is consistent with the Congressional "policy of supporting tribal self-government and self-determination," *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985), that this Court has consistently applied to forbid a "policy of hostility to the public Acts" of Indian tribes. *Franchise Tax Board*, 136 S. Ct. at 1279. Petitioners would make this "discriminatory hostility" not only permissible, but mandatory, in state courts. In *Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743, 760 (2002), this Court explained that the "primary purpose" of government immunity is to "accord States the dignity that is consistent with their status as sovereign entities." Thus, there is no apparent basis to require states to afford tribes, their fellow domestic sovereigns, less dignity.

B. Connecticut treated the Tribal Authority the same way that it would have treated an instrumentality of the Connecticut State government or another state.

Connecticut, like the federal government, requires suits for negligent actions by State employees to be brought against the State, not against the employee. Conn. Gen. Stat. § 4-165 ("No [S]tate officer or employee [of Connecticut] shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his or her duties or within the scope of his or her employment."). The State specifically applies this rule to employees operating motor vehicles. "Any person injured in person or property through the negligence of any [S]tate official or employee when operating a motor vehicle owned and insured by the [S]tate against personal injuries or property damage shall have a right of action against the [S]tate to recover damages for such injury." Conn. Gen. Stat. § 52-556. "[I]n the absence of legislative authority we have declined to permit any monetary award against the [S]tate or its officials or agents." *Bloom v. Gershon*, 856 A.2d 335, 341–42 (Conn. 2004) (quoting *Krozser v. New Haven*, 562 A.2d 1080 (Conn. 1989)).

Connecticut will dismiss a suit against an employee of another state for an automobile accident in Connecticut if that other state provides a remedy that is sufficiently adequate and is not repugnant to the policies of the state, *Perrino v. Yeager*, No. 50 55 81, 1991 WL 204894, at *3 (Conn. Super. Ct. Sept. 27, 1991). Significantly, the Connecticut Supreme Court has held that by approving the Mohegan Tribe–State of Connecticut Gaming Compact, the Connecticut legislature has established that the tort

claims provisions of the Mohegan Gaming Code provide an adequate remedy. *Kizis*, 794 A.2d at 503-04.

When considering the exact question of whether a judgment against a motor vehicle operator (a private company contractor) ultimately operated against the state, the Connecticut Supreme Court found that "a judgment against the defendant would have the same effect as a judgment against the State" because "[a]s a practical matter, a declaratory judgment that the defendant was required to purchase uninsured and underinsured motorist insurance for the buses would require the State to provide such insurance for all State owned buses . . . . [and] [t]hat, in turn, could affect the State's decisions on how many buses to operate and where and how often to run them." *Gordon v. H.N.S. Mgmt. Co.*, 861 A.2d 1160, 1175 (Conn. 2004). To mandate a different rule would be to require Connecticut courts to adopt a less favorable understanding of sovereign immunity for tribes than they adopt for their own state employees.

The Decision Below, far from being a departure from standard principles of sovereign immunity, is a routine application of established principles. What Petitioners are seeking here is to force state courts to take jurisdiction contrary to their own laws and practices, without any constitutional or statutory basis.

C. Connecticut's approach is more in keeping with modern, statutory sovereign immunity law and better public policy.

Over the years, through the implementation of tort claims acts, the United States and most states have chosen to closely manage their potential gov-

ernmental liability and made determinations as to whether and in what circumstances immunity will be waived for the government and its employees. *See, e.g.*, 28 U.S.C. §§ 1346(b), 2671-2680. In waiving their immunity, governments balance competing interests, such as the social benefits of compensation for torts victims and incentivizing the service of public employees. *See, e.g., Ceja v. Lemire*, 154 P.3d 1064, 1067 (Colo. 2007) (Colorado provides this protection to government employees even though the legislature recognizes that "governmental immunity 'is, in some instances, an inequitable doctrine'") (quoting Colo. Rev. Stat. § 24-10-102); *see also* Richard H. Fallon, *Symposium: Official and Municipal Liability for Constitutional and International Torts Today Does the Roberts Court Have an Agenda?: the History and Policy of Officer Immunity in the United States: Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 485 (2011) (outlining strong policy grounds necessitating government employee immunity – namely the extensive social costs that such suits impose: "These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'") (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)); *see also Bassett v. Mashantucket Pequot Museum and Research Center, Inc.*, 221 F.Supp.2d 271 (D. Conn. 2002) (cited in the Decision Below; holding that "[t]here is no basis for distinguishing between the actions of 'officials' or 'employees'" generally and that

"tribal immunity extends to all tribal employees acting within their representative capacity and within the scope of their employment").

Some governments narrowly tailor limited waivers of sovereign immunity for public entities and their employees, and only in certain circumstances. *See, e.g.* Colorado Governmental Immunity Act, Colo. Rev. Stat. § 24-10-106; Connecticut Claims Against the State, Conn. Gen. Stat. Ann. § 52-556; Georgia Tort Claims Act, Ga. Code Ann. § 50-21-20; New Mexico Tort Claims Act, N.M. Stat. Ann. § 41-4-4; North Dakota Claims Against the State, N.D.C.C. §§ 32-12.2-01; Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code Ann. tit. 5., ch. 101. Other governments offer broader waivers of sovereign immunity. *See, e.g.* Rhode Island Governmental Tort Liability Act., R.I.G.L. § 9-31-1; Washington Actions and Claims Against the State, R.C.W.A. § 4.92.090.

The Mohegan Tribe has waived immunity for claims related to its gaming activities, including establishing a forum for relief and enacting statutes of limitations within which claims may be brought. *See* Mohegan Tribe Code of Laws §§ 3-21 *et seq*. The forum is strikingly similar to that which Connecticut provides. Judges on the Mohegan Gaming Disputes Court are subject to the Connecticut Code of Judicial Conduct and the Connecticut Rules of Professional Conduct (except for Canon 5(F) of the Connecticut Code of Judicial Conduct, prohibiting judges from practicing law) and apply the General Statutes of Connecticut and Connecticut common law unless there is a specific tribal ordinance or regulation to the contrary. Mohegan Tribe Code of Laws §§ 3-24,

3-52. Just as Connecticut does, the Tribe also holds insurance coverage for claims against Tribal employees. Pet. App. 3a.

Like all governments, tribes must balance their need to provide appropriate recourse to people who have been injured by torts committed by their employees with the need to provide public services – a balance made more difficult by the fact that tribes are generally much smaller than states and have a very limited tax base, thus making it harder for them to self-insure against unexpected large liabilities. The approach taken by the Mohegan Tribe here, which provides a mechanism by which tort claimants can obtain relief, backed by insurance, is a sensible and increasingly popular approach to these problems. Tribal courts routinely handle tort cases pursuant to tribal laws wherein tribal governments have often created statutory waivers of their sovereign immunity. *See e.g.*, Navajo Nation Sovereign Immunity Act, 1 N.N.C. §§ 551 *et seq.* The essential point is that, regardless of the extent to which a government chooses to waive its immunity, the fact remains that it is a critical decision that must be reached by the government itself. *Hans*, 134 U.S. at 17.

There is no good reason to impose a national rule that prevents or discourages state courts from according comity to these tribal laws. If tribes find that these arrangements hold up in court and help them avoid dealing with the work-arounds, such as suing an employee in his personal capacity, that people use to attempt to avoid the implications of sovereign immunity, then more tribes may decide to

adopt appropriately tailored waivers of sovereign immunity in the future. Encouraging voluntary waivers of sovereign immunity, through enforcement, is the best way to provide recourse to future plaintiffs while at the same time according respect to tribal sovereignty.

In her concurring opinion, Justice Sotomayor stated that "both history and proper respect for tribal sovereignty – or comity" required the result in *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2041 (2014) (Sotomayor, J., concurring). The Decision Below is consistent with that vision of comity and Petitioners advance no reason why the State should be required to embrace the kind of asymmetry criticized by Justice Sotomayor in *Bay Mills*, e.g., by allowing state court suits against tribal employees that would be dismissed if brought against state employees. After all, "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*," The Federalist No. 81, at 548 (Alexander Hamilton) (B. Cooke ed., 1961) (emphasis in original); *see also Sossamon v. Texas*, 563 U.S. 277 (2011) ("Immunity from private suits has long been considered 'central to sovereign dignity.'") (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)).

Instead, sound public policy strongly favors affirmance. States and tribes must make their own governmental judgments as to how best to manage competing policy interests, as well as the public's assets, in exercising the powers invested in them by their citizens. Governments cannot and should not be broken down into their constituent parts—the

people who carry out the work of the government—for tort liability purposes because to do so ignores the fact that ultimately, it is the public that makes decisions as to whether and how the government risks liability and the public which judges a government's dealings with other governments such as the Gaming Compact.

Additionally, Amici submit that "[s]overeign immunity principles enforce an important constitutional limitation on the power of the federal courts." *Sossamon*, 563 U.S. at 284 (citing *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98 (1984)). Although *Sossamon* and *Pennhurst State* were grounded in analysis of the Eleventh Amendment's proscription of federal court jurisdiction over suits against unconsenting states, the reverse is also true—federal courts lack jurisdiction to conscript state courts into hearing disputes that state law provides they need not, where, as here, exclusive jurisdiction lies elsewhere. To hold otherwise, the Court would allow plaintiffs' lawyers to trump the judgments of state governments and require state courts to open their doors to all comers who labeled their claims as individual capacity suits. The Constitution gives the Court no such authority, extending federal jurisdiction to "certain enumerated subjects only," and leaving "to the several [s]tates a residuary and inviolable sovereignty over all other subjects." The Federalist No. 39 at 256 (James Madison) (B. Cooke ed., 1961).

II. CONNECTICUT RECOGNIZES MOHEGAN SOVEREIGN IMMUNITY, AS CODIFIED IN THE MOHEGAN GAMING CODE, AS A STATE LAW OBLIGATION.

In the Decision Below, the Connecticut Supreme Court cites *Kizis*, 794 A.2d 498 for the proposition that "this court has also recognized that tribal immunity extends to individual tribal officers and employees acting within the scope of their authority." Pet. App. 11a. Although the Decision Below simply quotes *Kizis* without going into the reasoning behind the decision, *Kizis* was decided primarily on state law grounds, derived from the Mohegan Tribe–State of Connecticut Gaming Compact and Connecticut General Statute § 47–65b, not under federal principles of tribal sovereign immunity. *Kizis*, 794 A.2d at 504-05.

Kizis, like the present suit, involved a tort action against employees of the Tribal Authority. *Id.* at 500-01. The Connecticut Supreme Court found that, "[t]he exercise of jurisdiction by [S]tate courts in this type of action would be in direct contradiction to the procedures established and consented to by the [T]ribe after negotiation with the [S]tate of Connecticut and the federal government." *Id.* at 505. In negotiating and approving the Gaming Compact, Connecticut accepted the Mohegan Gaming Disputes Court 'exclusive forum for the adjudication and settlement of tort claims against the [T]ribe and its employees because it is the forum in which the sovereign has consented to being sued, as set forth in Ordinance No. 98–1 amending the Mohegan Torts Code." *Id.* at 505–06. *Kizis* reached this conclusion despite acknowledging that "Connecticut has a genuine interest in providing a judicial forum to

victims of torts," because the State and the Tribe negotiated and established the exclusive "manner in which to redress torts occurring in connection with casino operations." *Id.* at 505.

Petitioners originally pleaded claims against both the Tribal Authority and Respondent, only to drop their claims against the Tribal Authority in hopes that relabeling their action as an individual capacity action would let them skirt State law that expressly recognizes the exclusivity of the Mohegan Gaming Disputes Court. Pet. App. 3a, n. 2. The Court has long rejected such shenanigans in the sovereign immunity context, holding that to permit actions to proceed merely because a government employee is "named in his individual capacity, would be to adhere to an empty formalism" and thus undermine the principle of governmental immunity altogether. *Idaho v. Coeur d' Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997).

The application of *Kizis* to the Decision Below is straightforward and does not present a question of federal law.

III. THE SOVEREIGN IMMUNITY OF TRIBES IS NOT SUBJECT TO DIMINISHMENT BY THE STATES, BUT THIS IS A FLOOR, NOT A CEILING.

"[I]n the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the states." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 891 (1986); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980); *Bay Mills Indian Commu-*

nity, 134 S. Ct. at 2031. Tribal sovereign immunity is distinct from that of the states and federal government, but as with all sovereigns, "[t]hat immunity . . . is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes*, 476 U.S. at 890. Only Congress, or a tribal government itself, may abrogate tribal immunity. *Bay Mills Indian Community*, 134 S. Ct. at 2038 ("Congress has continued to exercise its plenary authority over tribal immunity, specifically preserving immunity in some contexts and abrogating it in others"); *see also Kiowa Tribe*, 523 U.S. at 756.

Although the states may not diminish or abrogate Tribal sovereign immunity, the corollary is not true. *Bay Mills Indian Community*, 134 S. Ct. at 2041 (Sotomayor, J., concurring) ("Principles of comity strongly counsel in favor of continued recognition of tribal sovereign immunity, including for off-reservation commercial conduct."). The restriction on the diminishment of tribal sovereign immunity by the states derives from their status as pre-constitutional governments that "have not given up their full sovereignty." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Id.* The states may not withdraw these aspects of sovereignty, but there is no apparent reason why they cannot and should not apply the same principles of comity to those standards that they apply to any other sovereign government. This is especially true where, as here, a tribe and a state have negotiated forum exclusivity as a

component of the inter-governmental compact between them.

Many states interact with tribal governments on a daily basis and have reached working arrangements that go beyond the minimum respect for tribal law and tribal sovereignty required by federal law. Indeed, today it is routine that state governments anticipate tribal governments' ability to limit their potential tort liability and negotiate important policy issues flowing from that reality on a government-to-government basis.

One example of this is in the gaming insurance liability context. When Oklahoma authorized casino-style gambling for Indian tribes within its borders, the State codified a model tribal compact. *See Shefer v. Buffalo Run Casino, PTE, Inc.*, 315 P.3d 359, 364 (Okla. 2013). This model compact includes provisions regarding liability insurance coverage for tribal casinos. 3A Okla. Stat. § 281. As a condition for conducting Class III gaming in Oklahoma, tribal casinos must provide a limited waiver of sovereign immunity to their patrons and purchase liability insurance with an endorsement preventing the insurer from asserting sovereign immunity. Likewise, California's general practice is to include provisions in its gaming compacts that require a limited waiver of sovereign immunity and insurance coverage. Correspondingly, California courts enforce precisely the language of a tribe's waiver of immunity, including any limitations set forth in tribal law. *Campo Band of Mission Indians v. Superior Court*, 137 Cal. App. 4th 175, 183, (2006), *as modified on denial of reh'g* (Mar. 20, 2006) ("If the tribe has

consented to suit, any conditional limitation imposed on its consent must be strictly construed and applied"); *see also for example, Crawford v. Couture*, 385 Mont. 350 (Mont. 2016) (affirming dismissal of individual capacity torts claims brought in state court against tribal police officer where such claims were not allowed in applicable inter-governmental agreement).

These mutual solutions to the challenges and policy choices presented by the fact of tribal sovereign immunity serve the public interest and are consistent with federal law.

* * *

CONCLUSION

The Connecticut Supreme Court held that it has no subject matter jurisdiction over this case. That decision is in keeping with Connecticut's tort claims laws, Conn. Gen. Stat § 4-165; *Bloom*, 856 A.2d at 341–42, the laws of the Tribe, Mohegan Tribe Code of Laws §§ 3-21 *et seq.*, the Gaming Compact negotiated between the Tribe and the State and authorized by Connecticut statute, *Kizis*, 794 A.2d at 504-05, and principles of interstate comity, *Franchise Tax Board*, 136 S. Ct. at 1279. These are all questions of state law that fall outside the jurisdiction of this Court. *Hall*, 440 U.S. at 418.

The Court should accordingly affirm the Decision Below.

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RECORD AND BRIEF

No. 15-1500

Supreme Court, U.S.
FILED
DEC 21 2016
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BRIAN LEWIS, ET AL.,

Petitioners,

v.

WILLIAM CLARKE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Connecticut

BRIEF OF NINTH AND TENTH CIRCUIT TRIBES AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the sovereign immunity of a federally recognized Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment.

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INTEREST OF AMICI CURIAE

Pursuant to this Court's Rule 37.3, amici curiae Pala Band of Mission Indians, Redding Rancheria, Table Mountain Rancheria, Yocha Dehe Wintun Nation, Puyallup Tribe of Indians, Colorado River Indian Tribes, Gila River Indian Community, Elk Valley Rancheria, Ewiiaapaayp Band of Kumeyaay Indians, Jamul Indian Village, Modoc Tribe of Oklahoma, Mooretown Rancheria, Paiute Indian Tribe of Utah, Port Gamble S'Klallam Tribe, Pueblo de Cochiti, Pueblo de San Ildefonso, Pueblo of Jemez, Pueblo of Laguna, San Manuel Band of Mission Indians, Taos Pueblo, and Twenty-Nine Palms Band of Mission Indians (collectively "Amici Tribes" or "Amici") respectfully recommend that this Court affirm the determination below that immunity extends to individual tribal officials and employees, like Respondent, who have allegedly caused injury due to ordinary negligence while acting within the scope of their employment.[1]

Amici and other federally recognized Indian tribes are "'distinct, independent political communities'" preexisting the United States Constitution, and as such "have long been recognized as possessing the common-law immunity from suit traditionally enjoyed

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[1] This brief is filed with the consent of both Petitioners and Respondent, and correspondence reflecting those consents has been lodged with the Clerk of this Court. Pursuant to the Court's Rule 37.6, Amici Tribes state that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than Amici Tribes or their counsel, have made a monetary contribution to the preparation or submission of this brief.

by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 58 (1978) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)).

Amici's tribal governments comprise executive bodies, regulatory agencies, tribal legislatures, and tribal courts, all of which necessarily act through natural persons who staff them. Amici Tribes have a strong interest in a rule that permits their officials and employees to make decisions without fear that their duties will expose them to the indignity and disruption of a tort suit in a foreign forum or imperil their personal financial well-being.

Amici Tribes urge this Court to adopt a rule recognizing their officials' and employees' efforts to ensure the public safety of their tribal citizens and non-Indians alike. For the most part, Amici Tribes' reservations are located in rural communities, distant from nontribal emergency response services. Amici Tribes thus provide fire protection, paramedic services, search and rescue services, and police protection, both on tribal land and frequently to their neighbors outside their reservations through mutual aid agreements. Through their service to tribal governments, tribal emergency services employees risk their own lives to protect others.

Forcing these public servants to face suit, and potentially devastating personal liability, in foreign courts creates disincentives to provide these vital services. Moreover, subjecting tribal employees to a maze of state and local court jurisdiction would be flatly

contrary to Congress's consistent and oft-repeated policy of tribal self-government and self-determination.

The experiences of Amici Tribes demonstrate that even individual-capacity tort suits nominally against tribal officials deplete the tribal fisc. Amici Tribes are forced to defend tribal officials who face lawsuits for exercising their tribal duties. Not only is this essential to retaining qualified employees, it is necessary to safeguard tribal sovereignty and to protect the processes of tribal government from potential overreach or interference by foreign tribunals. As responsible government employers, tribes purchase insurance to cover their officials and employees. The more exposed tribal employees are to suit, the more the tribes pay for insurance out of their limited coffers. Accordingly, any notion that Indian tribes do not bear the cost of suits against their officials is a fiction.

Amici Indian tribes operate tribal governments in federal districts under the appellate jurisdiction of the United States Courts of Appeals for the Ninth and Tenth Circuits. Courts in both of these circuits have permitted plaintiffs to circumvent tribal sovereign immunity by merely naming tribal employees individually, and by seeking to recover the employees' personal assets rather than tribal assets. Because Petitioners and the Government each advance pleading-focused rules, Amici Tribes' experiences will help inform the Court as to the dire implications of such a rule denying to tribal officials those immunities from state tort law that other governments' officials possess.

SUMMARY OF ARGUMENT

This Court has recently confirmed that Indian tribes possess immunity for both their on- and off-reservation activities, whether these activities are commercial or governmental in nature. Indian tribes, like other governments, can only act through natural persons. Thus, immunity for the persons through whom tribal governments must necessarily act is, like the immunity of Indian tribes themselves, "'a necessary corollary to Indian sovereignty and self-governance.'" *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986)).

Petitioners contend categorically that "[t]he sovereign immunity of an Indian tribe does not bar individual-capacity damages actions against tribal employees for torts committed within the scope of their employment." Pet. Br. 5. In other words, according to Petitioners, a plaintiff's decision to name a tribal official in the official's individual capacity automatically renders the official subject to suit. Likewise, the Government contends that "suits seeking to recover damages from the officer or employee personally are not considered suits against the sovereign, even though they arise out of the agent's work for the sovereign, and they therefore are not barred by sovereign immunity." U.S. Br. 10-11. These proposed rules would permit a plaintiff to completely control, through artful pleading, whether or not a tribal official or employee could assert immunity to state tort claims, regardless of whether the employee

was performing duties on or off tribal land, exercising governmental discretion or performing ministerial work, or engaging in commercial or governance activity. Amici Tribes' experience operating under legal regimes applying rules like Petitioners' and the Government's demonstrates the detrimental effect of such rules on tribal self-governance and tribal sovereignty.

In contrast to absolute or qualified immunity protections that attach based on the nature of officials' actions, Petitioners' and the Government's proposed rules enable any plaintiff, through a pleading device, to circumvent the immunity of tribal officials and employees. As Congress repeatedly has recognized, government cannot operate properly under such a rule, which forces government employees to perform their official duties in fear of suit for personal liability under state tort law. Such concerns similarly hamper tribal governmental operations. Moreover, suits against tribal officials result in the indignity of exposing their governance duties – and internal governmental considerations, many of which are confidential – to foreign public tribunals. Such suits also necessarily direct officials' time and energy away from tribal governance. Recognizing these concerns, this Court has acknowledged the immunity of federal officials' executive, legislative, and judicial activity from state tort liability. Tribal governmental officials should continue to be afforded no less than the same immunity.

The Ninth and Tenth Circuits' moves toward pleading-focused rules, however, have spawned just the sort of litigation that is toxic to good governance.

Tribal executives, legislators, and regulators, have faced personal suits targeting their official governmental acts, such as administration of tribal property, regulation of tribal gaming facilities, and even retention of legal counsel to defend litigation and to petition the courts on a tribe's behalf. These suits are disruptive to the tribal officials who must defend their acts of governance in foreign courts. Even worse, the indignity these lawsuits visit echoes throughout Indian country, sapping the resolve of other officials entrusted to make hard decisions on which their people depend.

A pleading-focused rule is not only injurious to actions at the upper echelons of tribal government, but also to basic public health and safety services, frequently carried out by Amici Tribes' police, fire, and emergency health services officers pursuant to mutual aid agreements with nearby non-Indian communities. Congress already has unambiguously rejected such a pleading-focused rule as it pertains to federal employees precisely because of the rule's negative impacts on such core governmental functions. To avoid extending those negative impacts to tribal employees, this Court should eschew Petitioners' proposed rule and decline the Government's invitation to limit immunity to tribal employees or officials exercising discretionary judgment.

Finally, subjecting tribal officials to individual-capacity suits would substantially and uniquely impact tribal treasuries, in direct contravention of Congress's repeated retention of sovereign immunity as a means

of encouraging tribal self-government, self-sufficiency, and economic development.

ARGUMENT

I. Petitioners' and the Government's Proposed Rules Undermine Tribal Self-Government and Public Safety.

As governments preexisting the United States Constitution, Amici Tribes have the right "to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). Amici Tribes have exercised this sovereign authority to engage in governmental activities as diverse as legislating regarding tribal affairs, regulating tribal lands, regulating governmental gaming facilities, operating tribal court systems, providing firefighting services, police protection, and emergency medical services, and forging government-to-government relationships with states, localities, and the federal government.

This Court recently affirmed that Indian tribes' common-law immunity from suit is one of the "core aspects of sovereignty that tribes possess," subject only to congressional divestment. *Bay Mills*, 134 S. Ct. at 2030. Although Congress has plenary power over Indian tribal self-government, it can only strip aspects of tribal self-government away by "clear" and "unequivocal[]" statements. *Id.* at 2031 (quoting *C & L Enters., Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S 411, 418 (2001)). As a necessary corollary, "courts will

not lightly assume that Congress in fact intends to undermine self-government." *Id.* at 2032. Preserving Indian tribes' immunity to the officials and employees through whom they must act is necessary to safeguarding this sovereignty. *Cf. Bay Mills*, 134 S. Ct. at 2030; *see Barr v. Matteo*, 360 U.S. 564, 571 (1959).

Petitioners' proposed rule, however, would strip immunity from tribal employees and officials at all levels of government, subjecting them to private lawsuits under state tort law challenging actions that are essential to tribal self-governance. Amici Tribes' experiences under regimes of this sort demonstrate that such a pleading-focused rule interferes with the already-difficult, and resource-limited, endeavor of governing an Indian tribe.

A. Principles of Common Law Official Immunity Are Applicable to Tribal Government Officials and Employees.

This Court has long recognized that all branches of government work best when their officials' acts of governance are immunized from suit. *Spalding v. Vilas*, 161 U.S. 483, 498 (1896) (subjecting executive officials to civil suit for damages "would seriously cripple the proper and effective administration of public affairs as intrusted to the executive branch of the government"); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) ("Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good.");

Stump v. Sparkman, 435 U.S. 349, 355 (1978) (recognizing as "'a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself'") (quoting *Bradley v. Fisher*, 80 U.S. 335, 347 (1872)).

This Court also has recognized that common law immunity is necessary to allow federal employees "to exercise their duties unembarrassed by the fear of damage suits[,] . . . the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." *Barr*, 360 U.S. at 571. Not only do such suits "consume time and energies which would otherwise be devoted to governmental service," *id.*, but they also expose officials to the "indignity" of facing "the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)).

1. Preserving immunity for tribal employees for ordinary torts committed within the scope of employment fully comports with Congress's interpretation of the common law of governmental immunity applicable to Indian tribes as well as to the federal government. Indeed, this Court has acknowledged that tribal self-governance is uniquely vulnerable to foreign judicial process. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49,

60 (1978) ("[R]esolution in a foreign forum of intra-tribal disputes of a more 'public' character . . . cannot help but unsettle a tribal government's ability to maintain authority."). Subjecting tribal employees to tort suits in state courts would force tribes to defend their interests in, among other places, municipal courts, county courts, and state courts: that is, in a range of courts with a variety of procedures, requirements, and limitations. Those lower level, nontribal courts often have judges unfamiliar with rudimentary concepts of Indian law, even with such basic, fundamental concepts as Indian tribes' status as governments. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 566-567 (1983) (recognizing "a good deal of force" to the view that "[s]tate courts may be inhospitable to Indian rights"). Additionally, experience suggests that Indian tribes, which are often geographically remote and with limited treasuries, suffer greater performance disruption in the face of such suits than their federal and state counterparts. Timothy W. Joranko, *Tribal Self-Determination Unfettered: Toward A Rule of Absolute Tribal Official Immunity from Damages in Federal Court*, 26 Ariz. St. L.J. 987, 1023 (1994).

Petitioners' and the Government's proposed rules are precisely the sort that threaten to "inhibit the fearless, vigorous, and effective administration of policies" of tribal government. *See Barr*, 360 U. S. at 571. Apart from the indignity of being haled into court by private parties aggrieved by policy decisions, *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 146, defending litigation distracts from the business of governing. *Barr*,

360 U. S. at 571. Permitting any plaintiff to strip any tribal official of immunity simply by pleading "individual-capacity damages actions," Pet. Br. 5, would encourage political opponents, business rivals, or opponents of tribal sovereignty to subject officials at all levels of tribal government to tort suits in foreign courts. *See Butz v. Economou*, 438 U.S. 478, 515 (1978).

2. In advancing their pleading-focused theory of tribal immunity, Petitioners and the Government seek to resurrect the interpretation of common law immunity that Congress has explicitly overridden precisely because it undermines good governance. In 1988, this Court opined in *Westfall v. Erwin*, that "[t]he central purpose of official immunity, promoting effective government, would not be furthered by shielding [a federal] official from state-law tort liability without regard to whether the alleged tortious conduct is discretionary in nature." 484 U.S. 292, 296 (1988). Less than a year later, Congress directly overruled *Westfall* by passing the Federal Employees Liability Reform and Tort Compensation Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified at 28 U.S.C. §§ 2671-2680) ("Westfall Act").

Congress found that *Westfall* "seriously eroded the common law tort immunity previously available to Federal employees," thereby creating "an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation." Westfall Act, § 2(a)(4)-(5), 102 Stat. at 4563. Congress also noted that "the prospect of such liability will seriously undermine the morale and well being of Federal

employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts." *Id.* at § 2(a)(6); *see also* 134 Cong. Rec. S15,214 (daily ed. Oct. 7, 1988) (statement of Sen. Grassley) (observing "[t]he prospect of years of personal litigation against the Federal work force not only has a devastating impact on individual civil servants' pocketbooks, credit ratings, and morale, but will severely inhibit the ability of many agencies to carry out their mission").

The congressional findings and legislative history of the Westfall Act make clear that Congress "sought to override" this Court's decision in *Westfall* and "return Federal employees to the status they held prior to" the decision. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 425-426 (1995) (quoting H.R. Rep. No. 100-700, at 4 (1988)). Congress has unequivocally expressed the view that the public is best served when immunity protects individuals performing governmental duties, without regard to whether those duties are discretionary.

Petitioners and the Government suggest that *Westfall* is valid law that justifies imposing liability on certain tribal employees. Pet. Br. 16-17, 22 n.2; U.S. Br. 26-27. But as noted above, the Westfall Act recognized that the immunity of federal employees acting in the course of their employment is a "common law tort immunity," and in "overriding" this Court's decision, Congress restored this immunity to such employees. Of course, the Westfall Act did not explicitly address tribal

employees, but neither did this Court's decision in *Westfall*. Congress's reversal of *Westfall* is quite the opposite of a "clear" and "unequivocal[]" statement that would authorize extending the *Westfall* decision to tribal employees. *See Bay Mills*, 134 S. Ct. at 2031. To the contrary, there is no indication that Congress has sought to remove or limit the common law immunity of tribal employees and officials as Petitioners request, and this Court should decline their invitation.

B. Pleading-Focused Rules Facilitate and Encourage Suits Challenging Tribal Officials' Acts of Governance, Thereby Undermining Tribal Self-Government.

Under legal regimes like the one Petitioners propose, the plaintiff's bar repeatedly has sought to circumvent the immunity of Indian tribes by suing tribal employees and officials for their acts of self-governance. The negative effects of this phenomenon are especially pronounced in the Ninth and Tenth Circuits, where longstanding rules protecting tribal officials and employees from tort liability have been undermined by decisions permitting plaintiffs' counsel to determine whether tribal employees must face suit for their official actions. Amici Tribes' experiences in the wake of these pleading-focused decisions give life to this Court's concerns about the harm suits for damages visit on effective governance.

1. Consistent with this Court's precedents, the Tenth Circuit previously held that tribal government

officials' immunity from money damages depended on whether they "acted outside of their official authority, and thus, are not entitled to sovereign immunity." *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006) (holding tribal governor and other tribal officials not immune to money damages claims for actions "outside of their official authority" relating to the alleged theft of plaintiffs' crops).

Later, the Tenth Circuit changed course, announcing a rule that "[t]he general bar against official-capacity claims, however, does not mean that tribal officials are immunized from individual-capacity suits arising out of actions they took in their official capacities." *Native American Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008). The Tenth Circuit opined that immunity does not bar a suit "seek[ing] money damages from the officer 'in his individual capacity' . . . 'so long as the relief is sought not from the [sovereign's] treasury but from the officer personally.'" *Id.* at 1297 (quoting *Alden v. Maine*, 527 U.S. 706, 757 (1999)); *but see Burrell v. Armijo*, 603 F.3d 825, 832-833 (10th Cir. 2010) (mentioning *Native American Distributing*, but immunizing tribal governor and lieutenant governor from damages claims on the basis that "sovereign immunity generally extends to tribal officials acting within the scope of their official authority" and "hinges on the breadth of official power the official enjoys").

2. The Ninth Circuit recently experienced a similar about-face. In *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985), the Ninth Circuit

held tribal officials immune from money damages claims where they were named in their individual capacities for allegedly voting to exclude plaintiff from tribal land in violation of federal law. *Id.* at 478-480. The court's individual immunity analysis turned on whether tribal officials "were acting within the scope of their delegated authority." *Id.* at 479-480. The Ninth Circuit later confirmed that state law tort claims challenging acts of tribal governance by Amicus Pala Band of Mission Indians officials were barred even if pled against tribal officials. *Imperial Granite Co. v. Pala Band of Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991). The court observed that defendant officials' "votes individually have no legal effect; it is the official action of the Band, following the votes, that caused Imperial's alleged injury." *Id.* Thus, immunity attached to the tribal officials' acts of governance. *Id.* at 1272; *see Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 727 (9th Cir. 2008) (holding a plaintiff cannot circumvent an Indian tribe's immunity by naming a tribal officer instead).

Then, in 2013, the Ninth Circuit suddenly announced a "remedy-focused analysis" for evaluating tribal officer immunity. *Maxwell v. County of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013). In *Maxwell*, the plaintiffs sued tribal paramedics for their split-second decisions attending to a gunshot victim. *Id.* at 1080, 1087. Taking a cue from the Tenth Circuit's pivot in *Native American Distributing*, the panel held that, "[n]ormally, a suit like this one – brought against individual officers in their individual capacities – does not

implicate sovereign immunity," so long as "[t]he plaintiff seeks money damages 'not from the state treasury but from the officer[s] personally.'" *Id.* at 1088 (quoting *Alden*, 527 U.S. at 757). The *Maxwell* panel thus announced a "general rule that individual officers are liable when sued in their individual capacities." *Id.*

3. Although the *Native American Distributing* panel said the case before it relieved it from "wad[ing] into this swamp" of tribal officer sovereign immunity, 546 F.3d at 1297, the court's commentary has ultimately had far-reaching implications for Amici Tribes and across Indian country. The resulting pleading-focused rules have given plaintiffs virtually complete control over whether tribal officials must face suit for their acts of tribal governance, and plaintiffs in the Ninth and Tenth Circuits have enthusiastically wielded this bludgeon against tribes.

The defects inherent in Petitioners' proposed rule were evident when, adhering to the Tenth Circuit's *Native American Distributing* decision, an Oklahoma district court allowed a multimillion-dollar damages claim to proceed against six officials of the Fort Sill Apache Tribe's governing body, including the Tribe's chairman, for actions they took as tribal officials. *Nahno-Lopez v. Houser*, 627 F. Supp. 2d 1269, 1285 (W.D. Okla. 2009). The plaintiffs brought trespass claims after the Bureau of Indian Affairs rejected a lease of plaintiffs' property to the tribe, alleging that the tribe thereafter left certain tribally owned fixtures on the property without permission. *Id.* at 1276. The court acknowledged that the individual defendants

"could perhaps vote to have the Tribe move the fixtures, but acting individually, they would have no authority to remove the Tribe's fixtures." *Id.* at 1285. Still, the court held that the "claims for money damages from each of these individual defendants, sued in their individual capacities, are not barred, so long as it is clear plaintiffs seek money damages from the individual defendants personally and not from the Tribe." *Id.* (citing *Native American Distrib.*, 546 F.3d at 1297).

Even the Ninth Circuit's *Maxwell* decision, while stripping tribal officials of immunity to damages claims, acknowledged that suit challenging tribal governance functions "attack[s] 'the very core of tribal sovereignty.'" *Maxwell*, 708 F.3d at 1089 (quoting *Baugus v. Brunson*, 890 F. Supp. 908, 911 (E.D. Cal. 1995)). Nevertheless, the Ninth Circuit later permitted suit alleging high-level tribal officials and law enforcement officers were liable for money damages for their acts of governance. In *Pistor v. Garcia*, plaintiffs sued the chief of the tribe's police department, a tribal gaming office inspector, and the general manager of the tribe's gaming facility, who were exercising regulatory and law enforcement authority the tribe validly conferred under federal law and pursuant to a tribal-state compact. 791 F.3d 1104, 1109 & n.1 (9th Cir. 2015); *see* 25 U.S.C. § 2701(5) (recognizing tribes' "exclusive right to regulate gaming activity on Indian lands"). Despite reiterating "*Maxwell*'s caution about masked official capacity suits" pled against tribal officials, the *Pistor* panel brushed off any suggestion that suing tribal officials for damages for their governance of tribal gaming

would "'interfere with [tribal] administration, . . . [or] restrain the [Tribe] from acting.'" *Pistor*, 791 F.3d at 1113 (quoting *Maxwell*, 708 F.3d at 1088). The court thus denied immunity to high-level tribal officials and law enforcement officers sued in their individual capacities, under state tort law, for their participation in a criminal investigation on tribal land. *Id.* at 1108-1109, 1115.

A California court of appeal also recently allowed claims to proceed against tribal officials for regulating the tribe's gaming facility simply because the complaint sought damages against the officials in their personal capacities. *Cosentino v. Fuller*, 237 Cal. App. 4th 790, 189 Cal. Rptr. 3d 15 (2015), *as modified on denial of reh'g* (June 22, 2015), *as modified* (June 25, 2015), *ordered not to be officially published* (Sept. 23, 2015). The plaintiff's only alleged injury was the loss of his tribally issued gaming license, effected by defendants' votes in their capacity as tribal gaming commissioners.[2] *Cosentino*, 189 Cal. Rptr. 3d at 21; *see Imperial Granite*, 940 F.2d at 1271. The court nevertheless opined that it was solely for plaintiff "to decide what claims to allege, against whom to allege them, and in what capacity to name Defendants," noting that plaintiff "sought monetary damages against Defendants only in their individual capacities." *Cosentino*, 189 Cal. Rptr. 3d at 25.

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[2] In parallel federal litigation, the tribe and its gaming commission secured dismissal of plaintiff's claims on the basis of sovereign immunity. *Cosentino v. Pechanga Band of Luiseño Mission Indians*, 637 F. App'x 381, 382 (9th Cir. 2016).

Although the *Cosentino* defendants, joined by numerous California Indian tribes, successfully convinced the California Supreme Court to order depublication of the opinion, *Cosentino v. Fuller*, S227157, Sept. 23, 2015 (Cal.), the court of appeal's decision remained the law of the case for the tribal officials on remand. Cal. Rules of Court, Rule 8.1115(b)(1). Undeterred by the depublication order, the attorney who had brought the *Cosentino* case filed suit two days later against the chairman of Amicus Pala Band of Mission Indians challenging his acts governing the tribe. Complaint, *Pink v. Smith*, No. 37-2015-00032613-CU-BT-CTL (Cal. Super. Court, San Diego County, September 25, 2015) (on file with counsel). The suit pled claims under state tort law alleging the chairman violated federal, state, and tribal law in causing the tribe to retain legal counsel to undertake the depublication effort and defend other litigation. *Id.* ¶¶ 21-41, 56. On behalf of a disgruntled tribal member, the suit sought $600,000 in damages from the chairman personally, for his official acts of governance. *Id.* ¶ 74.

Experiences in *Pistor* and *Cosentino* confirm this Court's warning that "[a]n individual targeted by an administrative proceeding will react angrily and may seek vengeance in the courts." *Butz*, 438 U.S. at 480; *see also* 134 Cong. Rec. S15,214 (statement of Sen. Grassley) (indicating that "Westfall-type suits will be employed simply to harass and intimidate Federal employees who are only trying to do their jobs").

Recognizing this concern, the *Butz* Court held that persons who adjudicate in an administrative agency require the absolute immunity other executive officers possess. 438 U.S. at 512-513 (reversing denial of absolute immunity to administrative agency officials accused of instituting retaliatory administrative proceeding). This is especially true because, even when officials successfully defend litigation, governance has already suffered its effects. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("[E]ven such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982))).

In sum, rules like Petitioners' have already spawned suits exposing officials governing Amici Tribes and other tribal sovereigns to the disruption, fear, and indignity of facing the peril of suit and tort liability in a foreign forum. Amici Tribes' experiences counsel against a rule that leaves public servants throughout Indian country similarly exposed.

C. Petitioners' and the Government's Proposed Rules Undermine Tribal Security and Emergency Services Protecting Tribal Citizens and the Public at Large.

A pleading-focused approach to state law tort liability for tribal officers and employees also undermines another critical core tribal government function – protecting public health and safety. These concerns are

especially keen in and around Amici Tribes' reservations. Many reservations are rural and noncontiguous, necessitating close cooperation with neighboring non-Indian jurisdictions. This routinely requires tribal employees to perform their duties both on- and off-reservation – including police, firefighting, and paramedic services that are often dangerous and risky. Petitioners' view, under which these individual tribal officials and employees could be held liable for performing their tribal duties, would make recruitment and retention of first responders difficult, would chill and diminish tribal participation in mutual aid agreements that provide public health and safety services, and would negatively impact the delivery of these essential services to Indian and non-Indian communities alike. Such a rule would also hinder tribes' inherent right to exclude noncitizens from their reservations and protect persons within tribal territory by opening up tribal officers to suit for the exercise of tribal law.

1. The Provision of Public Safety and Emergency Services Through Mutual Aid Agreements Is Essential to the Functioning of Tribal Governments and to Non-Indian Communities.

Like most federally recognized tribes, most Amici Tribes and their reservations are situated in rural and sparsely populated areas. Some Amici Tribes, like the Yocha Dehe Wintun Nation, Pala Band of Mission Indians, Gila River Indian Community, and Mooretown

Rancheria provide their own fire protection and emergency services through tribal fire departments, staffed with paid, professional, full-time firefighters. These tribal firefighters protect tribal land, schools, health facilities, and other enterprises and serve and protect not only tribal citizens, but visitors, guests, and employees. They also provide fire service, paramedic protection, and advanced life support to residents in surrounding communities. Other Amici Tribes, such as Redding Rancheria, Table Mountain Rancheria, Ewiiaapaayp Band of Kumeyaay Indians, Elk Valley Rancheria, and Jamul Indian Village have no fire department but depend on neighboring local, tribal, or state fire departments for fire and emergency medical response.

For example, Amicus Yocha Dehe Wintun Nation has a highly trained and skilled fire department based on its trust land in Yolo County, California. The 35-member Yocha Dehe Fire Department ("YDFD") serves not only tribal lands but also provides critical emergency services to neighboring rural, underserved communities throughout Yolo County (and beyond) by way of a series of mutual aid agreements and automatic aid agreements. Out of more than 30,000 professional fire departments nationwide, YDFD is one of the only 234 career fire departments accredited by the Commission on Fire Accreditation International. Of the 18 fire departments in Yolo County (the rest of which are nontribal), YDFD is one of only two departments certified to perform search and rescue and swift-water rescue operations, and one of only three fire agencies

in the county certified for confined space and trench rescue operations. Of the 30 line YDFD firefighters, 22 are licensed as paramedics, a proportion far higher than other fire departments, whether rural or urban.

Similarly, Amicus Pala Band of Mission Indians operates a modern, fully equipped fire department with 31 full-time fire suppression personnel and up to 15 reserve firefighters, which serves not only its reservation community and casino, but also responds to calls for fires, traffic accidents, and paramedic needs that occur outside its reservation's boundaries.

Small rural communities near or adjacent to tribal lands typically have only volunteer fire departments staffed with part-time firefighters whose level of resources vary widely from community to community.[3] For residents in these communities, the nearest county-provided full-time professional fire department may be more than an hour away. Similarly, the availability and level of emergency medical care offered on tribal lands and in adjacent communities varies widely. Many volunteer fire agencies only offer the services of an emergency medical technician ("EMT") and do not employ paramedics, who have far more training and are qualified to administer a significantly broader

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[3] For example, in Guinda and Capay, California, the two towns closest to Yocha Dehe's territory, the local fire departments are part-time, volunteer organizations with limited training.

range of medical procedures than EMTs.[4] In the case of the YDFD, it is the *only* fire agency in Yolo County with paramedics on staff. Thus, the existence of a highly trained and sophisticated fire department on Indian land provides an important tangible benefit to nearby communities.

Like many tribes, several Amici provide such services to noncontiguous tribal land bases, and their tribal employees regularly traverse tribal trust land, tribe-owned fee land, and off-reservation non-Indian lands, sometimes multiple times in a single day. Other tribes like Amicus Redding Rancheria currently exercise jurisdiction over smaller, cohesive land bases. However, as these tribes gradually reacquire (often noncontiguous) tribal land bases previously lost to them, mutual aid agreements will likely become a necessity.

To ensure the availability of the highest level of firefighting and emergency medical services on tribal lands and in adjacent communities, tribes and tribal fire departments enter mutual aid agreements with

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[4] In California, EMTs need only 120 hours of training, Cal. Code Regs. tit. 22, § 100074, and may transport patients and provide advanced first aid including CPR. Paramedics, by contrast, must have 1,090 hours of instruction and are trained in all elements of pre-hospital advanced life support. *Id.*, §§ 100139, 100158. Paramedics are authorized to administer drugs intravenously, take blood samples, operate defibrillators, intubate patients, and carry out other specified medical procedures. *Id.*, § 100146.

state and local agencies.[5] These agreements are essential in addressing the "complexity, uncertainty, and cost of state and tribal jurisdiction in Indian country," *Cohen's Handbook of Federal Indian Law* § 6.05 (2012 ed.), and allow for the coordination of information, resources, and priorities among the participating fire departments and agencies. They also typically provide that the nearest agency to the incident will respond – or provide required backup services – regardless of the jurisdiction in which the incident occurs.[6]

The YDFD, for example, has entered into three separate mutual aid agreements, including the statewide California Fire Assistance Agreement, as well as four "automatic aid" agreements to provide fire and emergency response services to communities located off tribal land and for nontribal backup in the event of a major incident on tribal land. As a result of these agreements, the YDFD is regularly dispatched by the Yolo County Communications Center to incidents off tribal land, so approximately one-third of all YDFD services (240 out of 695 service responses over

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[5] *See, e.g.*, Cal. Health & Safety Code § 13863(a) ("A [fire protection] district may enter into mutual aid agreements with any federal or state agency, any city, county, city and county, special district, *or federally recognized Indian tribe*.") (emphasis added).

[6] *See, e.g.*, Cal. Code Regs. tit. 19, § 2415(a), defining "mutual aid" as "voluntary aid and assistance by the provision of services and facilities, including but not limited to: fire, police, medical and health, communication, transportation, and utilities. Mutual aid is intended to provide adequate resources, facilities, and other support to jurisdictions whenever their own resources prove to be inadequate to cope with a given situation."

the last 12 months) are provided to residents and property in neighboring communities. Under the terms of the California Fire Assistance Agreement, the YDFD has responded to and participated in 22 out-of-county assignments in rural California during 2016 alone. Amicus Pala Band currently is a party to ten mutual aid agreements, and has responded to over 1,000 service calls in 2016 alone, including more than 200 responses to calls outside of the Pala Band's territory.

In sum, these mutual and automatic aid agreements help ensure that all Americans – wherever they are located – receive the closest and most professional firefighting and emergency services available to them. While valuable everywhere, these agreements are particularly critical to public safety in rural communities, where tribal lands tend to be located, and where the nontribal community must typically rely on volunteer fire service agencies with more limited resources.

2. Petitioners' and the Government's Pleading-Focused Approaches Substantially Impair Tribes' Public Safety and Emergency Services Functions.

As discussed above in Part I.A.2, in advancing their pleading-focused theory of tribal official immunity, Petitioners and the Government would have this Court apply *Westfall* to tribes. Such a result would

seriously compromise the provision of vital tribal government public health and safety services to both Indian and non-Indian communities.

Congress expressed particular concern for the effect of the *Westfall* decision on law enforcement, public health, and safety. The House Report accompanying the Act noted that potential liability "will have its most severe impact on lower-level employees" but nevertheless found that such exposure "could lead to a substantial diminution in the vigor of Federal law enforcement and implementation." H.R. Rep. No. 100-700, at 3 (1988). The Department of Justice concurred, warning that "Westfall cannot help but to make it far more difficult for Federal agencies to accomplish their missions. Ironically . . . the most directly affected agencies *are likely to be those on the front line of protecting public health and safety*." Legislation to Amend the Federal Tort Claims Act: Hearing before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee on H.R. 4358, H.R. 3872, and H.R. 3083, 100th Cong. 58 (1988) ("Westfall Hearing") (statement of Robert L. Willmore, Deputy Assistant Attorney General, Civil Division) (emphasis added); *see also id.* at 33 (statement of Rep. Frank Wolf) (noting that "[e]mployees who are particularly liable include some of the Government's most critical performers, such as law enforcement officials").

Despite these concerns, certain courts, particularly within the Ninth and Tenth Circuits, have extended the mistaken premise of *Westfall* to permit personal capacity suits that involve tribal government

officials and employees, including public health and safety personnel. *See, e.g.*, *Maxwell*, 708 F.3d at 1087-1088 (permitting individual-capacity suit against tribal paramedics); *Pistor*, 791 F.3d at 1114-1115 (permitting individual-capacity suit against tribal officials who, in coordination with state law enforcement officials, detained persons suspected of wrongdoing at tribe's gaming facility). Among other harms, these decisions threaten the "fearless, vigorous, and effective administration of government policies," *Westfall*, 484 U.S. at 297 (quoting *Barr*, 360 U.S. at 571), through mutual aid agreements, especially in the case of employees "on the front line of protecting public health and safety."

Fire, of course, knows no jurisdictional lines. Firefighters and other first responders must make immediate life-or-death decisions without regard to whether the individuals they seek to protect are Indian or non-Indian or whether the burning building sits on trust or fee lands. Saddling these employees with tort liability not incurred by their otherwise immunized state and federal counterparts would endanger, rather than protect, public safety. *Cf.* S. Rep. No. 94-1264, at 5 (1976) (supporting legislation to immunize defense medical personnel, noting that, under threat of liability, "[m]edical personnel could become unduly cautious in administering to patients and begin to make decisions on the basis of what is in the best interest of the physician rather than the patient" and that "[s]uch a development would raise the cost and lower the quality of medical services").

Such a threat would also hamper tribal governments' ability to attract qualified applicants. *See* Westfall Hearing at 58 (statement of Robert L. Willmore) (noting that "as word of this situation spreads, the Federal Government will find it increasingly difficult to attract the brightest and the best candidates"). Recruiting such candidates is already a difficult proposition on tribal reservations, where the post is often isolated and the pay often low. Similar concerns led an earlier Congress to immunize Public Health Service medical personnel through the Emergency Health Personnel Act of 1970, Pub. L. No. 91-623, 84 Stat. 1868 (1970). The Act attempted to "alleviate some of the more acute problems arising out of critical shortages of physicians and other health personnel," particularly in rural areas, H.R. Rep. No. 91-1662, at 1 (1970), and contained an immunity provision included at the recommendation of the Surgeon General "in recognition of the low pay that so many of those who work in the Public Health Service receive." 116 Cong. Rec. 42,977 (1970) (statement of Sen. Javits). Stripping such immunity from tribal firefighters and other first responders will only exacerbate this problem.

Finally, subjecting tribal police, first responders, and security employees to suit threatens tribes' inherent tribal authority to protect their people and others in their territory. While this Court has recognized the limited divestment of tribal jurisdiction over non-Indians in certain areas, tribes "possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands." *Duro v.*

Reina, 495 U.S. 676, 696-697 (1990). Pursuant to this authority, tribal security officials may "restrain those who disturb public order on the reservation, and if necessary, [] eject them. Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities." *Id.* at 697; *see also Strate v. A-1 Contractors*, 520 U.S. 438, 456 n.11 (1997) ("We do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law."). Subjecting such an action to suit in state court strikes at the heart of a tribe's ability to manage its internal affairs and security. *See Montana v. United States*, 450 U.S. 544, 566 (1981) ("A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.").

By giving every plaintiff's attorney absolute control over whether and where a tribal public health and safety employee must face suit, Petitioners' and the Government's proposed pleading-focused rule undermines the public services of the "critical performers" exercising crucial aspects of tribal sovereignty. Westfall Hearing at 33 (statement of Rep. Frank Wolf). Tribal firefighting, emergency services, and law enforcement officers put their lives on the line to protect

tribal citizens and non-Indians from harm. These public servants should not face the risk of suit, and potentially ruinous personal liability, for fulfilling important duties for which their federal and state counterparts possess immunity.

II. Petitioners' and the Government's Proposed Rules Jeopardize Tribal Government Treasuries.

This Court consistently has deferred to Congress on questions of tribal sovereign immunity due to "Congress' desire to promote the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.'" *Okla. Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505, 510 (1991) (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987)); *accord Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 757-758 (1998); *see also Bay Mills*, 134 S. Ct. at 2039 ("As *Kiowa* recognized, a fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty."). Petitioners' argument that "suits against tribal employees do not 'threaten the financial integrity' of a tribe" simply because the judgment itself is enforced against an official's personal assets, and not those of the tribe, Pet. Br. 23-24, is an utter fiction, and one that turns this Court's precedents on their head.

In the experience of Amici Tribes, rules like the ones Petitioners and the Government propose present a substantial threat to tribal treasuries. First, tribes are forced to participate in individual-capacity suits to protect their own interests, as well as those of their officials. Second, Indian tribes indemnify their officials, which is good governance and necessary to retain qualified individuals who could otherwise work for other governments granting them immunity.

A. Litigating Individual-Capacity Suits Threatens Tribal Treasuries.

Petitioners' and the Government's pleading-focused rules will facilitate and inspire litigation against tribal employees and officials, requiring tribes to commit substantial resources to participate in such litigation. As a practical matter, tribes are inevitably and inextricably entangled in suits involving their officials and employees. Like other sovereigns, tribes have a significant governmental interest in participating in suits against tribal officials and employees arising from the performance of their official duties. *See supra* Parts I.B & I.C (discussing threat suits present to the exercise of self-government). Thus, as a consequence of the misguided adoption of a pleading-focused approach by certain courts, Amici Tribes must expend tribal resources to participate, either directly or indirectly, in suits against their officials and employees.

For instance, pleading-focused rules embroil tribes and their officials in civil discovery that depletes tribal

resources. A pleading-focused rule permits plaintiffs to expose tribal officials' and employees' duties to court-sanctioned discovery and ultimately trial based solely on the plaintiffs' tactical choice to seek money damages from the officials themselves. *Grand Canyon Skywalk Dev. LLC v. Cieslak*, No. 2:13-CV-00596-JAD, 2015 WL 4773585, at *7 (D. Nev. Aug. 13, 2015), *aff'd*, No. 215CV00663JADGWF, 2016 WL 890921 (D. Nev. Mar. 7, 2016) (citing *Maxwell* and opining that tribal sovereign immunity does not bar subpoenas served on tribal officers and employees); *Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155, 1161-1162 (10th Cir. 2014) (leaving open the issue of tribal officials' immunity to civil discovery). Many relevant documents relating to a tribal employee's official duties will be held by the tribe, thus requiring the tribe to respond, or help its employee respond, to intrusive discovery demands, with all the expense and disruption that entails. *See Mitchell*, 472 U.S. at 526; *Alltel Commc'ns, LLC v. DeJordy*, 675 F.3d 1100, 1103 (8th Cir. 2012) (noting that subpoenas to tribal officials entail "severe interference with government functions") (citing *Dugan v. Rank*, 372 U.S. 609, 620 (1963), and *Boron Oil Co. v. Downie*, 873 F.2d 67, 70-71 (4th Cir. 1989)). And when a tribal employee's defense relies on sensitive documents and information in the tribe's possession, the tribe may not share the employee's interest in releasing those documents, potentially driving a wedge between the tribe and its officials and employees, thereby raising the complexity and attendant cost of litigation and undermining relations between the tribe and the officers and employees on whom it relies.

B. Tribal Treasuries Bear the Burden of Individual-Capacity Suits Through Indemnity of Their Employees.

Petitioners dismiss tribes' responsibility to indemnify their employees as "voluntary," and therefore easily limited or abandoned by tribal governments. Pet. Br. 24. The reality is that tribes have no choice but to indemnify if they are to recruit and retain employees. In the experience of Amici Tribes, tribal governments simply cannot compete with other federal and state employers, especially in high-risk occupations on which public safety depends, if tribal employees are uniquely vulnerable to personal suits. And even if individuals accept the risk concomitant with tribal employment under the pleading-focused approach, tort liability exposure may very well limit tribal employees' willingness to properly perform high risk job duties.

Recruiting and retaining a qualified workforce through indemnity, however, imposes an unpredictable and often hefty burden on the tribal treasury. Indeed, in passing the Federal Drivers Act, Pub. L. No. 87-258, 75 Stat. 539 (1961) (codified at 28 U.S.C. § 2679(b)-(e)), Congress expressed a clear preference for immunity over indemnity, given the weighty burden state court judgments impose on federal resources, and the friction between jury trials in state court and the federal policy against them. *See, e.g.*, S. Rep. No. 87-736, at 2785-2786 (1961) (noting with approval the warning of the General Services Administration that indemnification "presents the likelihood of considerable difficulties in administration and of heavy expense to the Government, and is open to the further criticism that, as to

actions in State courts, judgments payable by the Government would usually be obtained by trial by jury, a procedure at variance with the requirement . . . that actions against the United States under the Federal Tort Claims Act shall be tried by the court without a jury").

Tribes also bear the increased costs of suits against their officials through insurance premiums under Petitioners' and the Government's pleading-focused approach. *See id.* (government procured liability insurance "would entail substantial and needless expense" when compared to immunity). After *Maxwell*, claims against tribal insurance policies (and self-insured tribal governments) have seen a predictable rise. This increase in claims, and the associated exposure in the state court system through jury trials and punitive damages, has already resulted in self-insured and insurance payouts that exceed the normal ratio to premiums, which inevitably means an increase in premiums. Tribes must either bear these additional costs or abandon insurance coverage to pay increased defense and indemnity costs directly out of tribal coffers.

Finally, given many tribes' chronically limited resources, tribes feel impacts to government treasuries more keenly than other sovereigns. Many tribes remain small and "financially disadvantaged," *Santa Clara Pueblo*, 436 U.S. at 65, struggling to support their governments and citizens with often miniscule resources. They suffer from lack of sufficient land bases and infrastructure, and their members are faced with some of the highest levels of unemployment and poverty in the nation. *See Bay Mills*, 134 S. Ct. at 2045

n.4 (Sotomayor, J., concurring) ("[E]ven reservations that have gaming continue to experience significant poverty, especially relative to the national average."). For instance, Amicus Elk Valley Rancheria subsists solely on the revenue of a small rural gaming facility, supplemented by public- and tribe-funded assistance. Amicus Ewiiaapaayp Band of Kumeyaay Indians has no gaming operations and funds its government through assistance from the federal government and from other tribes with gaming operations. A suit against Elk Valley Rancheria or the Ewiiaapaayp Band's officials or employees could deplete tribal resources to the point that those governments might no longer be able to carry out critical functions, such as assisting members with health care, education, and housing.

Amici also lack parity with state and federal governments with regard to the size of their tax bases, and in the exercise of their taxing authority. *See, e.g.*, *id.* at 2044-2045 (describing the "devastating legacy" of the sale of on-reservation lands to non-Indians, as a result of which "'there is no stable tax base on most reservations'"); *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 653-654 (2001) (tribal ability to tax generally limited to transactions occurring on tribal lands that significantly involve the tribe or its members).

In short, tribes face precisely the same challenges as their state and federal counterparts – often to a greater degree – but lack an equivalent ability to fund their treasuries. Tribal governance and self-sufficiency are considerably undermined by the allocation of

scarce tribal resources to costs of individual-capacity tort suits rather than the administration of tribal government.

CONCLUSION

For the foregoing reasons, Amici Tribes urge the Court to affirm the decision below.

Respectfully submitted,

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RECORD AND BRIEF

Supreme Court, U.S.
FILED
DEC 21 2016
OFFICE OF THE CLERK

No. 15-1500

IN THE

Supreme Court of the United States

BRIAN LEWIS, ET AL.,

Petitioners,

v.

WILLIAM CLARKE,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF CONNECTICUT

BRIEF FOR THE OTOE-MISSOURIA TRIBE OF INDIANS, THE LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, THE MECHOOPDA INDIAN TRIBE OF CHICO RANCHERIA, AND THE BIG VALLEY BAND OF POMO INDIANS OF THE BIG VALLEY RANCHERIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici are four federally recognized Indian tribes: the Otoe–Missouria Tribe of Indians, the Lac Vieux Desert Band of Lake Superior Chippewa Indians, the Mechoopda Indian Tribe of Chico Rancheria, and the Big Valley Band of Pomo Indians of the Big Valley Rancheria. Each tribe exercises powers of self-governance consistent with the United States' longstanding policy of encouraging tribal self-determination. Each operates a sophisticated government, with numerous branches and departments carrying out a wide array of traditional government duties, such as law enforcement, economic development, education, health care, and more. The effectiveness of these governmental operations depends on the tribes' ability to attract and retain well-trained and skilled employees. These tribes thus have a direct and significant interest in ensuring that tribal government employees are able to perform their essential job functions without fear of being subject to personal liability.

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[1] All parties to this litigation have consented to this *amici curiae* brief, and letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

It is a well-established tenet of federal Indian law that Congress has plenary authority to legislate over Indian affairs. It is a power that is not defined solely by the Indian Commerce Clause, as Congress has the ability to enact Indian-related legislation that has nothing to do with commerce whatsoever. This extra-constitutional legislative power springs from the trust relationship between tribes and the federal government, pursuant to which tribes are considered "wards of the nation," with the United States as their "trustee."

For over two hundred years, Congress has exercised this plenary power to dictate federal Indian policy. The operative policy has morphed throughout the years, quite dramatically. At one time, Congress encouraged total assimilation of Indians into non-Indian society; at other times, Congress encouraged termination of tribes altogether. Those policies are in the past. Since at least 1970, the congressionally mandated federal Indian policy is one of supporting tribal self-determination, including through economic development ventures such as gaming, as well as through the use of tribal dispute resolution processes.

Petitioners' suit would severely undermine Congress's commitment to furthering tribal self-determination. The facts underlying this case straightforwardly display how the Mohegan Tribe has exercised its sovereignty in a thoughtful, deliberate manner. The Tribe established the

Mohegan Sun Casino ("Casino") in an effort to generate revenues to support essential governmental functions, including social services for tribal members—a goal encouraged by Congress when it enacted the Indian Gaming Regulatory Act ("IGRA"). Pursuant to tribal and applicable federal law, the Casino is governed by an independent tribal regulatory agency, the Mohegan Tribal Gaming Authority. And per an intergovernmental agreement with the State of Connecticut, disputes arising from the conduct of Casino employees acting in their official capacity are to be heard by the Mohegan Gaming Disputes Court, a judicial body created specifically to adjudicate such disputes, which operates pursuant to laws similar to the State of Connecticut.

Indeed, the creation of the Casino for tribal economic development, the regulation of the Casino under tribal law, the adjudication of gaming-related disputes by a tribal judicial body, and the government-to-government negotiations with the State of Connecticut, all highlight the Tribe's efforts to achieve self-determination. Petitioners' suit threatens to undermine all of it. Because it is a lawsuit that Congress has not authorized in any manner, it should be rejected.

Rejecting Petitioners' invitation to diminish the existing scope of tribal immunity would cohere with the foundational doctrinal underpinnings of federal Indian law. Specifically, the Court should abide by the central tenet of federal Indian law that tribal sovereignty—including the doctrine of tribal immunity—should not be diminished unless

Congress expressly says so. Here, it is uncontested that Congress has not specifically authorized the type of lawsuit filed by Petitioners.

Whether viewed as an issue of "sovereign" immunity or "official" immunity, the outcome in this case should be the same. Both forms of immunity are a matter of federal law and can only be diminished by Congress acting pursuant to its plenary power over Indian affairs. Because Congress has not acted to diminish either form of immunity, Petitioners' suit is barred, and the Court should affirm.

ARGUMENT

I. Issues of federal Indian law, including tribal immunity, are within the exclusive domain of Congress.

Congress has long possessed what is described as "plenary" power over Indian affairs. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); *see also United States v. Lara*, 541 U.S. 193, 200 (2004) (citations omitted). It is "plenary" in the sense that Congress's authority over Indian affairs is not restricted to any specific subject area. It is also "exclusive" in that state and local governments lack any comparable authority to regulate Indian affairs (of course, unless that authority is explicitly delegated to them by Congress). Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012, 1014 (2015). This plenary power doctrine occupies a central role in the development of federal Indian law.

A. By virtue of the Indian Commerce Clause and the federal–tribal trust relationship, Congress enjoys plenary power over Indian affairs.

Congressional power over Indian affairs is foremost derived from the Commerce Clause, which explicitly grants Congress the authority "to regulate commerce . . . with the Indian tribes." U.S. Const., Art. I, § 8, cl.3. The Commerce Clause is one of only three references to Indians in the Constitution (and one of only two at the time of ratification),[2] and it is the sole provision that has proven to be constitutionally significant.

In the non-Indian context, it is well-established that Congress's powers under the Commerce Clause are "subject to outer limits." *United States v. Lopez*, 514 U.S. 549, 557 (1995). Congress may regulate "the channels of interstate commerce," "persons or things in interstate commerce," or "activities that substantially affect interstate commerce." *United States v. Morrison*, 529 U.S. 598, 608–09 (2000). This power is broad, to be sure, particularly with respect to the third category of permissible regulation—activities that "substantially affect" interstate commerce. *E.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding federal statute restricting the production and consumption of homegrown wheat). But there are

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[2] At the time of ratification, the only other mention of Indians was contained in the Article I, § 2 Census Clause (regarding apportionment); in 1868 the Fourteenth Amendment added a similar apportionment clause referencing Indians.

still limits. As stated in *National Federation of Independent Businesses v. Sebelius*, the Interstate Commerce Clause does not vest Congress with a general "police power." 132 S. Ct. 2566, 2578 (2012). Accordingly, "many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few"—lie beyond the reach of federal regulation under the Interstate Commerce Clause. *Id.*

The earliest federal legislation regarding Indian affairs—the Trade and Intercourse Acts—might be interpreted as reflecting a similar understanding of the *Indian* Commerce Clause. By and large, those Acts were tethered to what would unquestionably be considered commercial activity. Essentially, the Acts restricted the alienation of Indian land and regulated trade between Indians and non-Indians. *See Warren Trading Post Co. v. Ariz. State Tax Comm'n*, 380 U.S. 685, 688–90 (1965) (discussing the development of the Trade and Intercourse Acts).

Yet, although the Trade and Intercourse Acts were for the most part focused on commercial issues, the presence of certain criminal provisions in the Acts provided evidence that Congress intended to exercise a much broader control over Indian affairs. Jack Balkin, *Commerce*, 109 Mich. L. Rev. 1, 24–25 (2010) ("Congress clearly believed that it could reach both economic and noneconomic activity; at the very least it believed that it could regulate noneconomic activity in order to protect trade and diplomatic relations that would further trade."). Plainly, even

in the earliest era of federal Indian policy, Congress began to prod the notion of plenary power.

Indeed, Congress soon began to legislate on non-commercial issues affecting Indian country. One emblematic foray into purely intratribal and non-commercial activity was in response to the Supreme Court's decision in *Ex parte Crow Dog*, 109 U.S. 556 (1883), which held that federal courts lacked jurisdiction over a criminal prosecution brought against a Sioux tribal member for the on-reservation murder of a fellow Sioux. Congress reacted to *Crow Dog* by passing the Major Crimes Act, which provides for federal criminal jurisdiction over certain crimes committed by Indians in Indian country, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. Act of March 3, 1885, 23 Stat. 385, § 9. The Major Crimes Act almost immediately came under constitutional scrutiny in *United States v. Kagama*, 118 U.S. 375 (1886), a case that involved two Indians of the Hoopa Valley Tribe indicted in federal court for the murder of a fellow Hoopa Valley member. They challenged their indictment on the theory that Congress lacked constitutional authority to pass the Major Crimes Act.

The Court found that the law could not be sustained on the basis of Congress's powers under the Indian Commerce Clause, for the law had no connection to commerce. As the Court explained:

> [I]t would be a very strained construction of [the Indian Commerce Clause] that a system of criminal laws

> for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.

Id. at 378–79. Nor did any other constitutional provision apply. The Property or Territorial Clause of Article IV was inapplicable because the alleged crime took place on a reservation within the State of California. Likewise, the congressional power to effectuate Indian treaties was also found to be irrelevant, as no treaty was involved. *See* Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195, 213–14 (1984).

Nonetheless, the Court sustained the law, finding that Congress had the requisite power under a federal trusteeship theory. The Court placed great weight on the trust relationship between tribes and the federal government, pursuant to which Indian tribes are considered "wards of the nation, . . . dependent on the United States." *Kagama*, 118 U.S. at 383. The Court also described the trust relationship as one in which the United States protects tribes against hostile state governments:

> [The tribes] owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

Id. at 384. Consequently, the trust relationship became a source of Congress's plenary power over tribes.

At the time *Kagama* was decided, it might well have been thought that the trust relationship as a source of legislative power only authorized laws that effectuated the United States' "duty of protection." This turned out not to be the case, as seventeen years later, in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), the Supreme Court held that Congress's "plenary power" included the power to unilaterally abrogate Indian treaties. Thus, despite *Kagama*'s emphasis on the "duty of protection," the plenary power doctrine was expanded to authorize congressional actions that are clearly detrimental to tribal interests.

The upshot of this jurisprudence is that the doctrine of enumerated powers does nothing to restrict congressional action in the field of Indian affairs. Though the traditional understanding of

constitutional law is that congressional action must be authorized in the constitutional text itself—*e.g.*, through one or more of the enumerated powers in Article I—the same is simply not true with regard to legislation aimed at Indian tribes.

B. The plenary power doctrine plays a central role in Indian law jurisprudence, counseling against judicial diminishment of tribal sovereignty.

In light of Congress's plenary power over Indian affairs, the Court has made it clear that it will not infer a diminishment of tribal sovereignty absent clear and unmistakable evidence of congressional intent to that effect. This principle applies across the spectrum of Indian law cases, including to cases involving, *inter alia*, treaty-rights, land disputes, and immunity from suit.

1. Treaty Rights

The treaty-rights case of *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), illustrates the general principle. At issue in that case was whether the Mille Lacs Band retained hunting, fishing, and gathering rights on ceded land—rights guaranteed in an 1837 Treaty of Fort Snelling. Article V of the 1837 Treaty provided that "[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [*sic*] to the Indians, during the pleasure of the President of the United States." *Id.* at 177. The State of Minnesota argued that these usufructuary rights were lost by three independent actions: (1) an

Executive Order in 1850 issued by President Taylor; (2) an 1855 Treaty; and (3) the admission of Minnesota into the Union in 1858.

The Court first addressed the 1850 Executive Order. On its face, the Executive Order clearly purported to (A) remove the Chippewa from the ceded lands, and (B) terminate their usufructuary rights.[3] Nonetheless, the Court held that the Executive Order could not have terminated these rights because President Taylor had no authority (by statute, treaty, or otherwise) to order removal of the Chippewa, and the invalid removal order was not severable from portion of the Executive Order purporting to terminate the usufructuary rights. *Id.* at 189–93.

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[3] Specifically, the Executive Order provided:

> The privileges granted temporarily to the Chippewa Indians of the Mississippi, by the Fifth Article of the Treaty made with them on the 29th of July 1837, 'of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded' by that treaty to the United States; and the right granted to the Chippewa Indians of the Mississippi and Lake Superior, by the Second Article of the treaty with them of October 4th 1842, of hunting on the territory which they ceded by that treaty, 'with the other usual privileges of occupancy until required to remove by the President of the United States,' are hereby revoked; and all of the said Indians remaining on the lands ceded as aforesaid, are required to remove to their unceded lands.

Mille Lacs Band, 526 U.S. at 179.

Second, the Court held that the 1855 Treaty between the United States and the Chippewa likewise did not terminate the usufructuary rights. That treaty, the Court explained, "was designed primarily to transfer Chippewa land to the United States." *Id.* at 196. The State had relied on a sentence in the treaty providing that "[t]he said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." But the Court interpreted this sentence in light of historical context, which furnished no proof of any intent other than to transfer the land. The 1855 Treaty made no mention of usufructuary rights whatsoever, and the Court held that it could not have been properly understood by the tribes to terminate those rights. *See id.* at 195–200.

Finally, the Court held that Minnesota's entry into the Union did not terminate the Chippewa's usufructuary rights. In so holding, the Court recognized that "Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so." *Id.* at 202. The relevant statute, Minnesota's enabling Act, did not meet this standard. The Act made no mention of Indian treaty rights whatsoever, and the Court refused to apply the "equal footing doctrine" in such a way as to unnecessarily impair tribal sovereignty. *Id.* at 207 (citation omitted) ("Treaty rights are not impliedly terminated upon statehood.").

In short, though various sources of law could have been at least conceivably interpreted as terminating the Chippewa's usufructuary rights, the Court refused to draw such inferences. Instead, the Court required a clear and unequivocal termination of those treaty rights. Because such a clear and unequivocal statement could not be found anywhere in the record, the Court held that the Chippewa's treaty rights were retained.

2. Reservation Boundaries

The Court's reservation-diminishment cases trace a similar path. Just last term, for instance, in *Nebraska v. Parker*, 136 S. Ct. 1072 (2016), the Court held that an 1882 Act of Congress empowering the Secretary of the Interior to sell certain tribal lands to the west of a railroad right-of-way did not diminish the Omaha Indian Reservation.

The 1882 Act authorized the Secretary "to cause to be surveyed, if necessary, and sold" over 50,000 acres of reservation land lying west of the right-of-way. The Secretary was to appraise the land in forty-acre tracts and thereafter proclaim that the lands were "open for settlement." Nonmembers of the Tribe would be permitted to purchase 160-acre tracts of land for cash, which would be "placed to the credit of said Indians in the Treasury of the United States." The Act also allowed for allotments to be issued to tribal members, although only ten to fifteen allotments west of the right-of-way were ultimately issued. The remaining 50,157 acres were opened for settlement by nonmembers of the Tribe. *Id.* at 1077.

The land west of the right-of-way became the Village of Pender, and it is almost entirely occupied by non-members. In fact, "[l]ess than 2% of Omaha tribal members have lived west of the right-of-way since the early 20th century." *Id.* at 1078. This prolonged absence notwithstanding, the Tribe eventually asserted regulatory jurisdiction in 2006, requiring the Court to determine whether the 1882 Act diminished the reservation.

To diminish a reservation of its land base, the Court noted, congressional intent "must be clear." Accordingly, the Court found that it must look for "unequivocal evidence" as to whether Congress intended the 1882 Act to diminish the Omaha Indian Reservation. *Id.* at 1078–79.

The 1882 Act did not meet this standard. For starters, by its plain text, the Act did not provide for "a fixed sum for all of the disputed lands"—a statutory feature that would have strongly implied diminishment. Rather, the Act simply "opened" the reservation to allow non-Indians to buy tracts of land within the existing reservation boundaries. *Id.* at 1079–80. The legislative history and record of negotiations likewise failed to provide "clear and plain" or "unambiguous" evidence of intent to diminish the reservation. *Id.* at 1080–81.

The Court acknowledged that the Tribe has been "almost entirely absent from the disputed territory for more than 120 years" and noted that this subsequent demographic history could serve as a "clue" as to Congress's intent. However, the Court deemed subsequent demographic history, in and of

itself, insufficient to draw an inference of congressional intent to diminish the reservation. *Id.* at 1081–82. So, as in the *Mille Lacs* treaty-rights case, in deference to Congress's plenary power in Indian affairs, the Court refused to unnecessarily infer a diminishment of tribal sovereignty.

3. Immunity from Suit

The same deference to Congress evidenced in the above-described cases likewise applies to the issue of immunity from suit. The case of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), is instructive. In that case, the Kiowa Tribe defaulted on a promissory note that it had entered into with a non-tribal business entity and which was executed and delivered off tribal land. The non-tribal business (Manufacturing Technologies) sued the Tribe in Oklahoma State Court. The Tribe claimed sovereign immunity, a defense that was rejected by the Oklahoma Court of Appeals on the theory that immunity should not apply to off-reservation commercial activity. The U.S. Supreme Court granted certiorari[4] and reversed. *Id.* at 753–54.

The Court began by explaining that tribal immunity is a rule of *federal* law and thus not subject to diminution by the states. *Id.* at 754–55. Though the plaintiff had questioned the scope—and the very legitimacy—of tribal immunity, the Court

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[4] The Oklahoma Supreme Court declined review, so the case went directly from the Oklahoma Court of Appeals to the U.S. Supreme Court. *Kiowa*, 523 U.S. at 754.

rejected the invitation to narrow the doctrine. Instead, the Court chose to "defer to the role Congress may wish to exercise in this important judgment." *Id.* at 758.

As in the treaty-rights and reservation boundaries cases, the plenary power doctrine was central to the Court's analysis. It was not lost on the Court that Congress had previously taken legislative actions to adjust the limits of tribal immunity. For example, in the IGRA, Congress expressly abrogated tribal immunity for actions brought by a state or tribe to enjoin on-reservation gaming activities conducted in violation of a tribal–state compact. *See* 25 U.S.C. § 2710(d)(7)(A)(ii). The Court observed that these types of legislative restrictions on tribal immunity were a reflection of Congress's thoughtful consideration of the various policy concerns at issue—concerns that the Court acknowledged it was ill-equipped to address. *Kiowa*, 523 U.S. at 759 ("Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. . . . In light of these concerns, we . . . choose to defer to Congress.").

The cases described above reflect a common theme—that when it comes to Indian law, the Court historically defers to Congress's unique and exclusive role in setting federal Indian policy. Absent clear and unequivocal congressional intent, it is thus inappropriate for the Court to diminish tribal sovereignty, including by limiting the attendant doctrine of tribal immunity.

II. Congress is committed to a policy of encouraging tribal self-determination.

As the leading treatise on federal Indian law explains, "Indian law draws on disciplines as varied as anthropology, sociology, psychology, political science, economics, philosophy, and religion, [but the] most significant of these sources is history." Cohen's Handbook of Federal Indian Law, § 1.01, at 5 (2012). That is, in any federal Indian law case, the Court should view the issues within the greater historical context. In this case, it bears keeping in mind the above-described role of Congress in setting federal Indian policy, and specifically, how Congress's treatment of Indian tribes has evolved over time. While colonialism once dominated federal Indian policy, Congress has steadily and deliberately moved toward a policy of encouraging tribal self-determination.

In the years following ratification of the Constitution, Congress kept an especially close and protective grip on Indian tribes, almost separating Indians and non-Indians completely. The primary piece of Indian legislation in effect at the time was the Trade and Intercourse Acts, discussed *supra*. During this period, practically all economic activity between Indians and non-Indians was subject to federal oversight. Robert N. Clinton et al., American Indian Law 24–26 (5th ed. 2007).

After the War of 1812, the federal government moved towards a policy of relocating the Indians to accommodate for westward expansion. The original intention was initially to encourage tribes to

voluntarily move westward, often through bilateral treaties. But the process was slow, and state governments grew increasingly unsatisfied with Indians' continued presence within their borders. By the late 1820s, the situation reached a boiling point. Georgia passed a series of laws purporting to extinguish the Cherokees' title to land within the state, invalidate all Cherokee laws, and extend Georgia law to the disputed lands. Consistent with the plenary power doctrine, these laws were held unconstitutional in the case of *Worcester v. Georgia*, 31 U.S. 515, 516 (1832).

Of course, invalidation of the Georgia laws was of little practical consequence as far as removal was concerned. This was because Congress had recently passed the Removal Act of 1830, authorizing the President to negotiate with the tribes for their westward removal. Despite removal being "voluntary" in theory, tribes in fact faced great pressure to comply. Relocation brought severe hardship, as exemplified by the Cherokees' deadly journey in the Trail of Tears. Clinton et al., *supra*, at 27.

In the 1860s, policy began to shift yet again. By this point, westward settlers had leapfrogged the Indian Territory, and pressure to divest Indian lands continued to accelerate. The federal government reacted by confining tribes to smaller land bases, which became known as "reservations." Reservations were typically established by treaties negotiated by the President and ratified by the Senate. This process, however, left the House of Representatives with little input. Accordingly, in

1871, Congress passed a statute providing that the President could no longer negotiate treaties with Indian tribes. *See* 25 U.S.C. § 71. Congress's plenary power over Indian affairs thus became truly bicameral. And Congress soon began to assert this power in new and far-reaching ways, such as by passing the Major Crimes Act, discussed *supra*, thereby creating federal jurisdiction over crimes committed by Indians on Indian land.

Reservation policies were not universally favored among lawmakers. Some thought the effects of communal Indian land tenure hampered tribal economic development and that private land ownership would benefit the Indians by encouraging them to assimilate into non-Indian society. Others simply wanted reservations opened up for white settlement. These sentiments resulted in an assimilation policy implemented through the General Allotment Act of 1887, which authorized tracts of land to be assigned to individual Indian families. The allotment would be held in trust for a period of 25 years, after which the individuals would receive fee title. After the Indians within a reservation were given allotments, the surplus lands were opened up for non-Indian settlement. As the Supreme Court would later explain, "[t]he objectives of allotment were simply and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force assimilation of Indians into the society at large." *Yakima v. Yakima Indian Nation*, 502 U.S. 251, 254 (1992). Allotment did not result in the assimilation Congress intended; rather, the most notable consequence was the severe decline in the

amount of Indian-held land. *See generally Cobell v. Norton*, 240 F.3d 1081, 1087 (D.C. Cir. 2001).

Congress eventually realized allotment was a failed policy. In an attempt to reverse its ill effects, in 1934, Congress passed the Indian Reorganization Act ("IRA"). The IRA ended future allotment of tribal lands, indefinitely extended the trust period for existing allotments, and returned unallotted lands to tribal ownership. The Secretary of the Interior was authorized to acquire additional lands to be held in trust for tribes. Additionally, the IRA authorized tribes to adopt their own Constitutions, subject to approval by the Secretary. *See* 25 U.S.C. § 461 *et seq.*

The IRA was relatively successful in restoring tribal land and promoting tribal self-governance. Unfortunately, the IRA was not well-received among many members of Congress. Though the law was never repealed, Congress took other drastic measures in an attempt to revert to assimilationist policies. Specifically, in 1953, Congress passed House Concurrent Resolution 108, formally declaring that it intended to put an end to the federal–tribal relationship, thereby terminating all federal supervision and fully subjecting tribes to state authority. *See South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 503 (1986) (discussing the "termination era").

However, termination was never completely accomplished. It was essentially carried out tribe-by-tribe, and the complexity of the process made termination a lengthy endeavor. Yet, even though

many tribes were not terminated, Congress took other steps to alter the balance of sovereignty. By enacting Public Law 280, for example, Congress exercised its plenary power over Indian affairs to vest state governments with criminal jurisdiction over on-reservation crimes as well as adjudicatory jurisdiction over private civil litigation involving Indians. *See Bryan v. Itasca County*, 426 U.S. 373 (1976). This, some have observed, was a sort of half-measure short of outright termination, in that it gave states some authority over tribes that they otherwise would not possess. Clinton et al., *supra*, at 41.

Finally in 1970, President Nixon requested that Congress formally repudiate the termination policy. He explained: "Because termination is morally and legally unacceptable, because it produces bad practical results, and because the mere threat of termination tends to discourage greater self-sufficiency among Indian groups, I am asking the Congress to . . . expressly renounce, repudiate and repeal the termination policy." *See* Larry Echohawk, *Balancing State and Tribal Power to Tax in Indian Country*, 40 Idaho L. Rev. 623, 630–31 (2004) (citation omitted).

Congress agreed with President Nixon and soon pursued a legislative agenda designed to encourage tribal self-determination, economic development, and self-sufficiency. This included passage of the Indian Self-Determination and Education Assistance Act of 1975 ("ISDEAA"), which allows tribes to exercise local control over federally funded governmental services, such as education,

natural resource management, and law enforcement, among others.

To this day, Congress continues to endorse a federal Indian policy of encouraging tribal self-determination. This is demonstrated by congressional support of the use of tribal forums to settle disputes—including disputes with non-Indians. One of the more prominent federal statutes that exemplify this policy is the Indian Child Welfare Act ("ICWA"), which essentially protects the exercise of tribal jurisdiction over child custody cases involving Indian children. But the federal policy goes far beyond child custody proceedings. Indeed, the support of tribal dispute resolution systems is trans-substantive. Congress routinely dedicates funds to support tribal justice systems, finding that they are "appropriate forums for the adjudication of disputes affecting personal and property rights." *See* 25 U.S.C. § 3601(6).

So after over two hundred years of evolving federal Indian policy, it has become settled that the overriding congressional goal in the area of Indian affairs is to protect tribal self-government and encourage tribal self-determination. It is this backdrop of federal Indian policy against which this case presents itself.

III. Suits against tribal employees for actions taken in their official capacity—which are not authorized by Congress—undermine the congressional policy of encouraging tribal self-determination, and should not be permitted.

As was stated in Respondent's brief, Petitioners' claims are barred by both sovereign immunity and official immunity. The Tribe's sovereign immunity bars Petitioners' claims because the Tribe is clearly the real party in interest in this case, as any judgment against Respondent would "inevitably" be paid by the Tribe. *See Edelman v. Jordan*, 415 U.S. 651, 665 (1974). Alternatively, *official* immunity also bars Petitioners' claims, because federal common law affords absolute immunity to state tort liability to tribal employees acting within the scope of their official duties. *See Barr v. Matteo*, 360 U.S. 564, 571 (1959). The Court may resolve this case under either theory, as the decision below clearly blended the two concepts together.

To elaborate on those points, Petitioners' suit should be barred because it would severely undermine the explicitly pronounced congressional objective of encouraging tribal self-determination. As set forth above, federal Indian law issues are the domain of Congress, and Congress has long been committed to a policy of encouraging tribal self-determination—including through the tribal gaming industry and the use of tribal dispute resolution. To allow Petitioners' suit to go forward in the Connecticut Superior Court would unduly and severely infringe upon the Mohegan Tribe's sovereignty and hamper its efforts (and the efforts of all tribes, including the *amici*) to achieve true self-determination.

A. Petitioners' suit, brought in Connecticut state court, interferes with the Tribe's self-determination.

This case directly implicates the Tribe's self-determination efforts. It centers on the operation of an economic arm of the Tribe that was specifically created to further tribal self-sufficiency. Resolution of the issue of whether an employee of that entity is subject to suit for actions taken in his official capacity will have profound consequences for the Tribe, the *amici*, and all of Indian country.

Respondent William Clarke is a limousine driver who was transporting patrons of the Tribe's Mohegan Sun Casino to their homes when he collided with Petitioners' vehicle. At the time, he was acting in his capacity as an employee of the Mohegan Tribal Gaming Authority ("MTGA"), an independent tribal regulatory agency created pursuant to the Tribe's Constitution, which exercises powers and authorities delegated to it by the Tribal Council, the Tribe's governing body. *See* Mohegan Const., Art. XIII, § 1. The MTGA oversees all aspects of "the development, construction, operation, promotion, financing, regulation and licensing" of the Tribe's gaming activities. *Id.*

The Tribe has also established a remedial forum for individuals allegedly injured by Casino employees. Mohegan Tribal Code, § 3-248(a). This remedial forum—the Mohegan Gaming Disputes Court—is an integral component of the Tribe's gaming operation. It fulfills an essential role under the tribal–state compact between the Tribe and the

State of Connecticut,[5] as the Compact provides that the Tribe must establish "reasonable procedures for the disposition of tort claims" and that the remedial system must be "analogous to that available for similar claims arising against the State or such other remedial system as may be appropriate . . . ." Tribal–State Compact, § 3(g), *available at* https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-026002.pdf

The court is governed by a set of laws duly enacted by the Tribe—laws designed to facilitate the fair and equitable resolution of patrons' complaints. Those laws are generally modeled on Connecticut law. For example, like Connecticut, the Tribe does not allow suits against its government employees; instead, the MTGA is substituted as a defendant. Mohegan Tribal Code § 3-131. Limitations on recovery are also akin to the limitations imposed by state governments, such as the prohibition on awards of punitive damages.

Given its role in the tribal–state compact and the importance of resolving patrons' disputes generally, the status of the Mohegan Gaming Disputes Court as the exclusive venue for patrons' complaints is inextricably tied to the success of the underlying gaming business. Gaming, of course, is vital to tribal economic development—not just for the Mohegan Tribe, but for tribes nationwide. It is also a form of economic development that has been

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[5] Under the IGRA, in order to offer "Class III" gaming, a tribe must enter into a compact with the State in which it is located. 25 U.S.C. § 2710(d)(1)(C).

emphatically supported by Congress. As the findings in the IGRA explain, "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701(4).

These goals would be severely undermined if the Petitioners' suit is allowed to move forward in Connecticut Superior Court. The Tribe has taken deliberate measures to negotiate a compact with the State of Connecticut, and Petitioners' suit threatens to make aspects of the Compact a total nullity. There would be essentially no point in the Tribe and the State negotiating for a dispute resolution process if patrons could simply bypass these legal processes take their tort claims to the state courthouse.

Furthermore, aside from the gaming implications, circumventing tribal immunity through mere pleading maneuvers creates a significant threat to the Tribe's ability to self-govern. It would be difficult to attract and retain well-trained and competent employees if those employees were constantly at risk of becoming subject to frivolous lawsuits. Public service to tribes should be encouraged, yet Petitioners' theory of the case would create a great disincentive for talented individuals that might otherwise wish to work for tribes.

Hence, in the absence of express congressional authorization, this Court should flatly reject Petitioners' argument. Indeed, as set forth *supra*, the Court has repeatedly recognized that tribal sovereignty—and the attendant doctrine of tribal immunity—should not be diminished unless

Congress unequivocally says so. This principle is grounded in two centuries of case law, spanning subject areas such as treaty rights, reservation boundaries, and of course, immunity.

B. Whether analyzed as "sovereign" immunity or "official" immunity, Congress has not authorized this suit.

The Court can resolve this case by holding that Respondent is protected by either "sovereign" immunity or "official" immunity. Under either theory, the outcome is the same, as Congress has exercised its plenary power over Indian affairs "conservatively," only limiting the scope of tribal immunity "in a few specific contexts," none of which apply in this case. *See* Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 Tulsa L. Rev. 661, 717 (2002).

1. Congress has not abrogated tribal sovereign immunity so as to allow Petitioners' suit to proceed.

This case should be viewed as presenting an issue of sovereign immunity, as the Tribe is clearly the real party in interest. Any judgment against Respondent will not be paid out of Respondent's own assets, but rather out of the assets of the sovereign Tribe. Because such a lawsuit has not been authorized by Congress, it is barred by the Tribe's sovereign immunity. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2037 (2014) ("[I]t is

fundamentally Congress's job, not [the Court's], to determine whether or how to limit tribal immunity.").

Indeed, Congress has consistently refused to abrogate the doctrine of tribal sovereign immunity. This decision is not a byproduct of ignorance or legislative disinterest. In fact, far from being indifferent to the issue, Congress has repeatedly—and deliberately—chosen to preserve tribal sovereign immunity.

For example, when creating a financial assistance program under the ISDEAA, to remove any doubt as to whether the program affected tribal sovereign immunity, Congress specifically provided that no part of the program "shall be construed as . . . affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe." 25 U.S.C. § 5332(1). As this provision makes clear, Congress is mindful of the doctrine of tribal sovereign immunity, has decided that it serves an important function in tribal government, and has therefore opted to keep it in place.

To be sure, Congress has on multiple occasions exercised its plenary authority to enact legislation abrogating or placing limitations on sovereign immunity. The practice extends all the way back to 1891, when Congress enacted the Indian Depredation Act. 26 Stat. 851–54 (1891). The Act created a remedial mechanism for victims of "wrongs" committed by Indians such that they could receive compensation for "property . . . taken or

destroyed by Indians belonging to any band, tribe, or nation in amity with the United States." *See United States v. Gorman*, 165 U.S. 316, 320 (1897). However, tribal liability under the Act was extremely limited; tribes would only be liable to the extent the judgment could be paid from annuities or other federal payments owed to the tribe. Otherwise, the United States would be responsible for the judgment. *Id.* at 319. As the provisions in the Act make clear, even in the early years of federal Indian policy, Congress has been careful to preserve tribal immunity so as to protect the tribal treasury, and in turn, tribal self-government.

In 1968, Congress enacted another limited abrogation of tribal immunity, this time in the Indian Civil Rights Act ("ICRA"). The ICRA imposed upon tribes a set of civil rights standards similar (though not identical) to those in the Bill of Rights. 25 U.S.C. § 1302. However, the ICRA included only a narrow abrogation of sovereign immunity, designed for cases brought by petition for habeas corpus. § 1303. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Court flatly refused to infer a broader abrogation of immunity. The Court reasoned that "Congress's failure to provide remedies other than habeas corpus was a deliberate one," and it would be improper to find an implied waiver of immunity for non-habeas cases. *Id.* at 61, 70–72.

More recently, in 2000, Congress enacted the Indian Tribal Economic Development and Contracts Encouragement Act, thereby limiting tribes' ability to raise sovereign immunity in contractual agreements. Pub. L. 106-179, codified at 25 U.S.C. §

81. This legislation prohibited tribes from entering into contracts that "encumber Indian lands for a period of 7 or more years" unless specifically approved by the Secretary of the Interior. § 81(b). Approval would be withheld if the contract at issue failed to include an express waiver of sovereign immunity. § 81(d)(2). As the terms of this legislation show, its scope is significantly limited—applying only to contracts encumbering land for seven or more years. Like the other statutes, this legislation indicates a careful deliberation on Congress's part. It reflects Congress's judgment that the development of tribal lands would benefit by a federal requirement that certain land-related contracts include an express waiver of sovereign immunity.

More noteworthy to the case at hand, Congress has in fact abrogated sovereign immunity for gaming-related disputes—but only for a certain category of these disputes. Specifically, Congress has statutorily abrogated sovereign immunity to permit "any cause of action [in federal district court] initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact." 25 U.S.C. § 2710(d)(7)(A)(ii). This narrow provision is the sole abrogation of sovereign immunity under the IGRA, and the Court has given that provision an appropriately strict construction. *See Bay Mills*, 134 S. Ct. at 2032. The statute includes no broader provision to allow other suits against tribes or their employees, such as tort claims brought against casino employees, and the Court has refused to infer what is not there.

Yet, though Congress has enacted a variety of statutes carefully modifying tribal sovereign immunity, Congress has *never* enacted any generalized abrogation of the doctrine. This has not been an oversight, as Congress has repeatedly considered, and rejected, such legislation. For example, in 1998, in the 105th Congress, Senator Slade Gorton (R-WA) introduced S. 1691, the "American Indian Equal Justice Act." The bill proposed to eviscerate tribal sovereign immunity, allowing claims to be brought against tribes in federal or state court with respect to torts, contracts, or other federal or state causes of action. However, S. 1691, and other similar bills introduced by Senator Gorton, though thoroughly debated, were never enacted by Congress. Seielstad, 37 Tulsa L. Rev. at 726–29 (2002).

Accordingly, because the Tribe is the real party in interest in this case, Petitioners' claims are barred by sovereign immunity, and because Congress has not taken any action to abrogate sovereign immunity, the Court should affirm.

2. **Congress has not altered the *Barr* rule of absolute official immunity against state tort liability, a rule that applies to tribal officials.**

Even if this case is viewed as presenting an issue of "official" immunity, the outcome should be the same. Just as Congress has decided to leave tribal *sovereign* immunity intact (with a few narrow statutory exceptions), Congress has likewise refused to diminish the doctrine of *official* immunity. The federal common law rule of official immunity

therefore controls, and that rule provides tribal employees with absolute immunity against state-law tort claims.

As explained in Respondent's brief, *Barr v. Matteo*, 360 U.S. 564 (1959), supplies the proper federal common law rule regarding the scope of official immunity. Under *Barr*, government employees receive absolute immunity against state-law tort claims, regardless of whether they hold an "exalted office," so long as their actions were taken "within the outer perimeter of [their] line of duty." *Id.* at 572, 575. The Court reasoned that such suits "would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." *Id.* at 571.

This Court retreated from *Barr* in the case of *Westfall v. Erwin*, 484 U.S. 292 (1988). In that case, the Court held that absolute immunity against state-tort liability required a finding that the government employee's alleged tortious conduct be discretionary in nature. *Id.* at 296–97. In so holding, however, the Court noted that official immunity is an area of law in which "Congress is in the best position to provide guidance." *Id.* at 300. And, in fact, Congress soon *did* provide that guidance.

Congress responded to *Westfall* immediately, enacting the Federal Employees Liability Reform and Tort Compensation Act, Pub. L. 100-694 (1988), now known as the Westfall Act. The Westfall Act "delete[d] the 'discretionary function' requirement,

finding it an unwarranted judicial imposition." *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 426 (1995). The Westfall Act thereby restored the federal common law rule of official immunity previously recognized under *Barr*.

Westfall has thus become discredited by virtue of the Westfall Act. Congress made it clear that it did not approve of the reasoning in *Westfall* (which was comprised mainly of the Court's ad hoc balancing of various empirical factors), and it would be a grave mistake for the Court to revert to that reasoning. *Cf. Seminole Tribe v. Florida*, 517 U.S. 44, 68 (1996) (finding that *Chisholm v. Georgia*, 2 U.S. 419 (1793), became "discredited" upon ratification of the Eleventh Amendment). Accordingly, the *Westfall* decision does not govern the scope of tribal official immunity against state-law tort claims; *Barr* does.

Absolute immunity against state-law tort claims is thus the appropriate federal common law rule regarding claims brought against tribal officials. Of course, Congress could exercise its plenary power in Indian affairs to alter this rule, but it has thus far opted not to do so. Indeed, just as Congress has declined to diminish tribal *sovereign* immunity, so too has Congress refused to diminish tribal *official* immunity.

Both breeds of tribal immunity (sovereign and official) are rules of federal common law. Congress has plenary power to alter these rules so as to allow a suit like Petitioners' to proceed in state court. But Congress has deliberately refused to exercise its

plenary power in such a manner. Because it is Congress's role—not the Court's—to determine whether and how to diminish tribal immunity, the Court should affirm. *Bay Mills*, 134 S. Ct. at 2037.

CONCLUSION

The judgment of the Connecticut Supreme Court should be affirmed.

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No. 15-1500

IN THE

Supreme Court of the United States

BRIAN LEWIS, ET AL.,
Petitioners,

v.

WILLIAM CLARKE,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

BRIEF FOR *AMICI CURIAE* SEMINOLE TRIBE OF FLORIDA, ET AL.,* IN SUPPORT OF RESPONDENT

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United South and Eastern Tribes, Inc.

California Nations Indian Gaming Association

Tribal Alliance of Sovereign Indian Nations

QUESTION PRESENTED

Whether the sovereign immunity of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment.

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INTEREST OF *AMICI CURIAE*[1]

The Seminole Tribe of Florida, Lytton Rancheria, Santa Ynez Band of Chumash Indians, Suquamish Tribe, Prairie Band Potawatomi Nation, Kickapoo Traditional Tribe of Texas, Cheyenne and Arapaho Tribes, Absentee-Shawnee Tribe of Indians of Oklahoma, Lac du Flambeau Band of Lake Superior Chippewa, Pueblo of Pojoaque, Guidiville Rancheria of California, Wampanoag Tribe of Gay Head (Aquinnah), Rincon Band of Luiseño Indians, Alabama-Coushatta Tribe of Texas, Spokane Tribe of the Spokane Reservation, and the Swinomish Indian Tribal Community are federally recognized Indian Tribes. *Amicus* United South and Eastern Tribes, Inc. (USET) is an intertribal organization comprised of 26 federally recognized Indian Tribes in the southern and eastern United States.[2] *Amicus* California Nations Indian Gaming

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3, counsel of record for the Petitioners has consented to the filing of this brief, and written notification of that consent accompanies this filing. The Respondent has filed blanket consent for the filing of *amicus curiae* briefs in support of either or neither party.

[2] The USET member Tribal Nations are: Alabama-Coushatta Tribe of Texas; Aroostook Band of Micmacs; Catawba Indian Nation; Cayuga Nation; Chitimacha Tribe of Louisiana; Coushatta Tribe of Louisiana; Eastern Band of Cherokee Indians; Houlton Band of Maliseet Indians; Jena Band of Choctaw Indians; Mashantucket Pequot Tribal Nation; Mashpee Wampanoag Tribe; Miccosukee Tribe of Indians of Florida; Mississippi Band of Choctaw Indians; The Mohegan Tribe; Narragansett Indian Tribe; Oneida Indian Nation; Passamaquoddy Tribe - Pleasant Point; Passamaquoddy Tribe - Indian Township; Penobscot Indian Nation; Poarch Band of Creek Indians; Seminole Tribe of Florida; Seneca Nation of Indians; Shinnecock Indian Nation;

Association (CNIGA) is a non-profit organization comprised of federally recognized tribal governments and is dedicated to protecting the sovereign right of Indian tribes to have gaming on federally recognized Indian lands, and *amicus* Tribal Alliance of Sovereign Indian Nations (TASIN) is an intergovernmental association of tribal governments in Southern California.[3]

Amici Tribes and USET member Tribal Nations (collectively "*Amici* Tribes") have a strong interest in this case because of its potential impact on the scope of immunity for tribal officials and employees and the range of core sovereign interests that immunity protects.[4] But *Amici* Tribes' interest in this case also extends to its potential impact on a wide array of negotiated intergovernmental agreements and tribal laws that govern *Amici* Tribes' working relationships with their sister governments and commitments to individual state and tribal citizens, and which specify tort remedies and immunity waivers as negotiated

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Saint Regis Mohawk Tribe; Tunica-Biloxi Tribe of Louisiana; and Wampanoag Tribe of Gay Head (Aquinnah).

[3] CNIGA member Tribes are listed at: http://www.cniga.com/members/tribes.php. TASIN member Tribes are listed at: http://www.tasin.org/about-us/our-tribal-communities.

[4] The United States as *amicus curiae* has taken the position in this case that official immunity, rather than sovereign immunity, applies to tribal officials and employees sued in their personal capacities. While *Amici* Tribes assert that tribal sovereign immunity extends to the actions of tribal officials and employees acting within the scope of their authority on behalf of the Tribe, official immunity functions to protect many of the same core sovereignty interests and the end result is largely the same. In contrast, Petitioners wrongly argue that *no* immunity is available to tribal officials and employees and that individual capacity suits against them ought to be permitted without limitation.

between the sovereigns and as appropriate to the specific parties and their situations. These agreements include Tribal-State gaming compacts entered into under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (IGRA), through which Congress has preempted the field of Indian gaming. Under the IGRA, Tribes and States that wish to negotiate remedies for tort claims related to Class III gaming must use the Tribal-State compact process.

Amici Tribes' various intergovernmental agreements and tribal laws, including their mandatory IGRA compacts, effectively address the problem that Petitioners ask this Court to solve: access to tort remedies for individuals alleging harm by a tribal employee. Petitioners ignore the existence of IGRA compacts and other intergovernmental agreements and tribal laws addressing tort remedies when they falsely claim that Tribes have attempted to unilaterally exempt themselves from tort liability and that tort victims would routinely be left without a remedy unless this Court holds that individual capacity suits are permitted as an exception to tribal immunity. And while negotiated intergovernmental agreements can and do address these questions with sensitivity to the specific situation and needs of the parties (and, in so doing, encourage better working relationships between Tribes and state and local governments), the ruling sought by Petitioners would do the opposite: Petitioners request the creation of a broad exception to (and an end-run around) immunity for tribal employees that would upend the careful balance struck in *Amici* Tribes' existing agreements with state and local governments and destabilize the working relationships between Tribes and those entities through sweeping and sudden legal changes inconsistent with the IGRA and other settled law.

Amici believe that this brief will aid the Court by illustrating how Tribes and States regularly deal with questions of immunity and tort remedies in a variety of contexts, including but not limited to tort claims against employees of tribal gaming establishments. In cases such as this one involving actions connected to Indian gaming, *Amici* Tribes believe that Petitioners' position is precluded by the IGRA and its Class III compact requirements, and that the Court should decide this case on those narrow grounds. Alternatively, *Amici* Tribes hope to aid the Court in understanding the ruinous impacts to existing and future negotiated agreements and intergovernmental relationships that would be caused by the much broader ruling Petitioners seek. Such a ruling would open the floodgates for non-negotiated, state court remedies against tribal officials and employees without any limitations whatsoever, essentially voiding negotiated intergovernmental agreements addressing tort remedies in any context and, in the case of gaming-related disputes, violate the statutory structure set forth by Congress in the IGRA.

SUMMARY OF ARGUMENT

Petitioners argue that the decision below "gives tribal employees an absolute immunity from suit that undermines the State's interest in deterring wrongful conduct and tort victims' interest in receiving compensation for their injuries." Pet. Br. 2.[5] They also imply that the tribal court remedy available to them in this case was adopted by the Tribe in a unilateral attempt to curtail the Petitioners' rights, stating: "While the

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[5] Petitioners elsewhere state that "barring state-law tort actions against individual tribal employees would represent an unwarranted intrusion on state regulatory authority and would deprive tort victims of compensation." Pet. Br. 6.

Tribe has the authority to limit the jurisdiction of its own courts, it may not limit the jurisdiction of the Connecticut courts, and it may not strip petitioners of their state-law rights by insulating Clarke from liability for his off-reservation conduct." Pet. Br. 29. Finally, Petitioners broadly assert that permitting state-law individual capacity suits against tribal employees is "the only way to deter tortious conduct" because tribal enterprises will otherwise "not be forced to internalize the cost of [their] misconduct." Pet. Br. 27.

The Petitioners' suggestion that a broad, systemic problem exists with respect to the protection of state interests and access to tort remedies in situations like those involved in the instant case is simply false. Also false is the Petitioners' assertion that the Tribe in this case attempted to unilaterally undermine state procedural rights that would otherwise be available to them.

The reality is quite different. Against the backdrop of sovereign and official immunity as established by federal law, Tribes regularly enter into intergovernmental agreements with States and their subdivisions that address both state and tribal interests in providing remedies for tort victims and protecting tribal and state citizens against uncompensated injury. In cases like this one involving disputes connected to Class III gaming, Congress mandated in the IGRA that these questions be left to negotiations between tribal and state sovereigns to establish the balance of tribal, federal and state interests—including remedies for torts—in Tribal-State compacts that must be approved

or deemed approved by the federal government.[6] This gives all States with Tribes seeking to offer Class III gaming within their borders the opportunity to negotiate immunity waivers or alternative protections for tort victims as the State deems necessary and appropriate. In contrast, allowing individual capacity actions against tribal employees acting in connection with tribal gaming activities without such an agreement would be a violation of the exclusive and specific legislative scheme in the IGRA that preempts any such actions unless authorized by Tribal-State compacts.

Apart from the IGRA, *Amici* Tribes, like other Tribes across the country, routinely enter into negotiated intergovernmental agreements that address issues of mutual concern, like public safety and mutual aid, and improve working relationships between Tribes and state and local governments. These agreements result in improved local services for state and tribal citizens alike, and are generally far more effective for long-term intergovernmental cooperation than winner-takes-all lawsuits. When these agreements are negotiated, as with IGRA compacts, the State acts on behalf of its citizens to ensure access to appropriate remedies while also reaping the benefits of intergovernmental cooperation and resource-sharing.[7]

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[6] 25 U.S.C. § 2710(d)(3) provides that Tribal-State compacts shall take effect (permitting the Tribe to engage in Class III gaming) "only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register." *See also*, 25 U.S.C. § 2710(d)(8)(C) (Tribal-State compact is deemed approved if the Secretary does not act to approve or disapprove the compact within 45 days, but only to the extent not inconsistent with the IGRA).

[7] Petitioners argue that it would be unfair to require a tort victim to follow a claims procedure that it has not specifically

Even when the Tribe has no occasion to negotiate such matters with a State, Tribes routinely provide for tort remedies as a matter of tribal law. Particularly where a Tribe operates a gaming enterprise or other business that relies on significant interactions with non-Indians, Tribes understand that remedial processes and tort compensation must be made available as a matter of good business, even if federal rules would otherwise permit blanket immunity. Even Tribes that do not have a formal tribal court system in place can and do exercise their sovereign authority to create administrative procedures for tort victims; in some cases, they have agreed to limited sovereign immunity waivers for state court suits in certain circumstances.

The wholesale abrogation of immunity for tribal officials and employees sought by the Petitioners in this case is not only unnecessary to ensure access to tort remedies, but it would both undermine Congressional intent of the IGRA in cases like this one *and* upset the balance of intergovernmental agreements that provide significant benefits to both tribal and state sovereigns in many other contexts. Simply put,

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negotiated with the Tribe or agreed to in advance (i.e., through a contract with the Tribe). Pet. Br. 28-29. However, would-be tort victims are not entitled to personally negotiate with a state sovereign over specific remedies or procedures to which they will be bound in the event of injury by a state employee, either. This is acceptable because individual citizens may rely on representation of their interests through the State's political process. When a State has the opportunity to negotiate with a Tribe over matters including relief for tort victims, the interests of individual state citizens in ensuring fair compensation for injury are protected to the same degree. There is no rational basis for demanding an individual consent requirement.

the ruling sought by Petitioners is a poor solution to a problem that, in fact, rarely even exists.

ARGUMENT

I. Congress has acted through the IGRA to establish that negotiated Tribal-State gaming compacts are the exclusive vehicle for negotiating matters relating to Class III gaming, including immunity waivers and remedies for gaming-related torts like the one at issue in this case.

In this case, the Petitioners have alleged injury as a result of tortious conduct committed by an employee of the Mohegan Tribal Gaming Authority, the arm of the Mohegan Tribe responsible for operating the Mohegan Sun Casino. In order to offer Class III gaming at the Mohegan Sun Casino, the Mohegan Tribe was required to negotiate and enter into a Tribal-State gaming compact with the State of Connecticut under the IGRA, which in turn had to be approved by the federal government before taking effect. 25 U.S.C. § 2710(d). Like many Tribal-State gaming compacts, the compact between the Mohegan Tribe and the State of Connecticut includes a negotiated provision addressing tort remedies.[8] Pursuant to that provision

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[8] In the case of the Mohegan Tribe, the Tribal-State compact provides as follows:

> (g) Tort remedies for patrons. The Tribe shall establish, prior to the commencement of class III gaming, reasonable procedures for the disposition of tort claims arising from alleged injuries to patrons of its gaming facilities. The Tribe shall not be deemed to have waived its sovereign immunity from suit with respect to such claims by virtue of any provision of this Compact, but may adopt a remedial system analogous to that available for similar claims arising against the

(which requires the Tribe to consult with the state gaming agency) and its own tribal laws, the Mohegan Tribe created a tribal court remedy that is even broader than the compact requires and was available to the Petitioners in this case to seek redress for their grievances. *See* MOHEGAN TRIBE OF INDIANS CODE, Ch. 3, Art. 2, § 3-21 *et seq.* (Sept. 30, 2016).

Indeed, remedies for the type of tortious activity alleged in this case (i.e., by an employee of a tribal gaming operation) are within the scope of matters that Congress provided may be negotiated and delineated in a Tribal-State compact under the IGRA. The IGRA, including its Class III compact requirement, is a comprehensive federal scheme completely preempting the area of tribal gaming activities. *See, e.g.*, *Tamiami Partners, Ltd.* v. *Miccosukee Tribe of Indians*, 63 F.3d 1030, 1033 (11th Cir. 1995) ("The occupation of this field by [IGRA] is evidenced by the broad reach of the statute's regulatory and enforcement provisions and is underscored by the comprehensive regulations promulgated under the statute."); *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433-35 (9th Cir. 1994) (IGRA preempts state license fee based on wagers at Indian gaming facilities); *Alabama v. PCI*

> State or such other remedial system as may be appropriate following consultation with the State gaming agency.

Tribal-State Compact between the Mohegan Tribe and the State of Connecticut § 3(g) (last updated July 11, 2011), http://www.ct.gov/dcp/lib/dcp/pdf/gaming/tribal_state_compact_mohegan%5b1%5d.pdf. To the extent the parties chose not to address every possible gaming-related tort claim against the Tribe or its employees in this negotiated provision, the parties chose to leave existing laws (including the federal rules of tribal and official sovereign immunity) intact and to leave it to the Tribe to determine the proper remedy in those cases.

Gaming Auth., 15 F. Supp. 3d 1161, 1170-72 (M.D. Ala. 2014), *aff'd on other grounds*, 801 F.3d 1278, 1286 n.17 (5th Cir. 2015).[9]

There is no doubt that Congress intended to establish a regulatory scheme for Class III gaming that allows States and Tribes to negotiate various issues concerning the operation of Class III casinos, including remedies for the State's citizens to seek compensation for injuries allegedly suffered in connection with such gaming activities. At the same time, Congress required that a State's asserted interest in such matters be addressed in a Tribal-State compact as opposed to any other vehicle. As the Eighth Circuit has held:

> The legislative history indicates that Congress did not intend to transfer any jurisdictional or regulatory power to the states by means of IGRA unless a tribe consented to

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[9] Federal preemption depends on congressional intent and may be either express or implied:

> Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose."

Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152–53 (1982) (internal citations omitted; modifications in original). These principles apply even in matters that are normally "of special concern to the States." *Id.* at 153.

> such a transfer in a tribal-state compact. . . . Congress thus left states with no regulatory role over gaming except as expressly authorized by IGRA, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact. Tribal-state compacts are at the core of the scheme Congress developed to balance the interests of the federal government, the states, and the tribes. . . . The statute itself and its legislative history show the intent of Congress that IGRA control Indian gaming and that state regulation of gaming take place within the statute's carefully defined structure. We therefore conclude that IGRA has the requisite extraordinary preemptive force necessary to satisfy the complete preemption exception to the well-pleaded complaint rule.

Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 545-47 (8th Cir. 1996).

The IGRA defines what can be included in the scope of Class III gaming compacts as follows:

> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
>
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
>
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
>
> (v) remedies for breach of contract;
>
> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
>
> (vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(C). *See also Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2028–29 (2014) ("A tribe may conduct such [Class III] gaming on Indian lands only pursuant to, and in compliance with, a compact it has negotiated with the surrounding State. A compact typically . . . allocates law enforcement authority between the tribe and State, and provides remedies for breach of the agreement's terms.") (internal citations omitted). Pursuant to 25 U.S.C. § 2710(d)(8)(B), the Secretary may disapprove a compact that has been negotiated between and agreed to by a Tribe and State only if it violates the IGRA, any other provision of Federal law, or the trust obligation of the United States to Indians.[10]

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[10] For example, compacts and compact amendments have been disapproved by the Secretary on the grounds that they purported to address issues entirely unrelated to gaming, such as hunting and fishing rights and land title issues, Letter from Kevin K. Washburn, Assistant Sec'y–Indian Affairs, to the Hon. Deval Patrick, Governor of the Commonwealth of Mass. 7-9 (Oct. 12,

Under these guidelines, at least seventeen different States have negotiated express provisions in Tribal-State compacts to address tort remedies for activity connected to Class III gaming.[11] A review of the seventeen different States' compacts establishes that the matter of tort remedies is fully vetted, negotiated between sovereign Tribes and sovereign States, and approved or permitted to go into effect by the United States government. There is no boilerplate provision. Each State negotiated for its own best interests, including the protection of those injured as the result of negligence by the gaming operation and/or its employees. The provisions vary as to requirements for mandatory liability insurance,[12] for example, and

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2012), https://www.indianaffairs.gov/cs/groups/webteam/documents/text/idc1-028222.pdf; because they would have limited the use of trust property to gaming and casino operation activities only, Letter from Donald Laverdure, Principal Deputy Assistant Sec'y–Indian Affairs, to the Hon. Kimberly M. Vele, President, Stockbridge-Munsee Cmty. of Mohican Indians 1-2 (Feb. 18, 2011), https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-024497.pdf; and because they contained revenue sharing provisions that would have amounted to an impermissible tax, fee, charge, or other assessment on the Tribe, *e.g.*, Letter from Larry Echo Hawk, Assistant Sec'y–Indian Affairs, to the Hon. Sherry Treppa, Chairperson, Habematolel Pomo of Upper Lake (Aug. 17, 2010), https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-024698.pdf.

[11] All compacts that have not been disapproved by the Department of the Interior are available on the Department's official web page, http://www.indianaffairs.gov/WhoWeAre/AS-IA/OIG/Compacts/index.htm.

[12] *See, e.g.*, Tribal-State Compact between the Mashpee Wampanoag Tribe and the Commonwealth of Massachusetts Part 20 (2014) (requiring Tribe to maintain public liability insurance up to specified minimum limits), http://www.indianaffairs.gov/cs/groups/webteam/documents/document/idc1-028231.pdf; Class III Gaming Compact between the Sac and Fox Nation

limited waivers of tribal sovereign immunity.[13] Some States have even negotiated specifics such as forum or court,[14] application of certain bodies of law,[15] applicable statutes of limitation,[16] and the awarding of punitive damages and attorney fees.[17] In each case,

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of Missouri in Kansas and Nebraska and the State of Kansas § 3(E) (1995) (same), http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-025967.pdf.

[13] *See, e.g.*, Gaming Compact between the Seminole Tribe of Florida and the State of Florida Part VI.D.5 (2010) (limited waiver of sovereign immunity for state court tort claims with tribal administrative exhaustion requirement), http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-026001.pdf; Tribal State Compact between the Cherokee Nation and the State of Oklahoma § 8(b) (2010) (waiver of sovereign immunity for tribal court tort claims up to specified limits of public liability insurance), http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-024697.pdf.

[14] *See, e.g.*, Seminole Tribe Compact, *supra* note 13, at Part VI.D.4 (providing that claimants may bring tort claim "in any court of competent jurisdiction in the county in which the incident alleged to have caused injury occurred" if prerequisites to suit are met).

[15] *See, e.g.*, Tribal State Gaming Compact between the Prairie Band Potawatomi Nation in Kansas and the State of Kansas § 3(D) (1995) (applying the Kansas Tort Claims Act to the extent not inconsistent with the IGRA or tribal law), http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-025966.pdf.

[16] *See, e.g.*, Tribal Gaming Compact between the Absentee Shawnee Tribe of Oklahoma and the State of Oklahoma Part 6.A.4 (2004) (notice of tort claim must be submitted to Tribe within one year, or claim shall be barred; judgment shall be reduced by 10% if claim filed after 90 days but within one year), http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc-038404.pdf.

[17] *See, e.g.*, Tribal-State Compact between the State of California and the Santa Ynez Band of Mission Indians §§ 12.5(b)(1), (2) (2015) (Tribe not required to agree to provide

the State is given a meaningful opportunity to ensure that viable enforceable remedies are available to allegedly injured parties in accordance with state policy interests.

Tort remedies are one of several concessions a State can seek from a Tribe in exchange for the ability to conduct Class III gaming within state borders under the IGRA, and the Class III compact requirement provides a powerful incentive for Tribes to negotiate fair and effective remedies. Congress intentionally relied on this balance of interests in enacting the IGRA, choosing the compacting method over more rigid and intrusive extensions of state authority over Indian gaming and related activities. S. REP. NO. 100-446, at 13-14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083-84.[18] By the same token, it is incumbent on a State to use the compact negotiation process to protect its own interests and those of its citizens and to negotiate for changes to the default rules of sovereign and official immunity if the State deems such changes necessary.[19]

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punitive damages and tort ordinance may preclude any awards of attorney's fees), http://www.cgcc.ca.gov/documents/compacts/AMENDED_COMPACTS/Santa%20Ynez%20Compact%202015%20(3).pdf.

[18] *See also* S. REP. NO. 100-446 at 13 (explaining that "[a]fter lengthy hearings, negotiations and discussions, the Committee concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of [Class III gaming.]"); *id.* at 6.

[19] It is noteworthy that while the IGRA establishes federal standards for gaming on Indian lands, the scope of Tribal-State compacts under the IGRA extends to matters that are related to such gaming, including off-reservation impacts that may be of concern to the States. For instance, *amicus* Santa Ynez Band of

Like many other Tribes, several of the *Amici* Tribes are required by their Tribal-State compacts to provide various negotiated remedies for tort claims against them and their employees acting in the course of their authority in connection with the Tribes' gambling operations. For example, to meet the obligations under its Tribal-State compact with the State of California, *amicus* Santa Ynez Band of Chumash Indians provides and pays for an insured non-judicial mechanism for the payment of tort claims for negligent acts of their employees and agents in connection with the Tribe's gaming activities. Santa Ynez Band Compact, *supra* note 17, at § 12.5. The Tribe further agreed to a limited waiver of tribal sovereign immunity to allow such remedies. *Id.* The scope of this remedy is expansive and extends to "any claim for bodily injury, personal injury, or property damage, arising out of, connected with, or relating to the operation of the Gaming Operation, Gaming Facility, or the Gaming Activities, including, but not limited to, injuries resulting from entry onto the Tribe's land for purposes of patronizing the Gaming Facility or providing goods or services to the Gaming Facility[.]" *Id.* at § 12.5(a) (scope of required insurance coverage); *id.* at § 12.5(b)(1) (scope of tribal ordinance).[20]

Chumash Indians' compact includes provisions relating to off-reservation environmental impacts and encourages intergovernmental agreements to address those impacts, including, for example, traffic impacts to state highways. Santa Ynez Band Compact, *supra* note 17, at § 11.

[20] Under the first negotiated IGRA compact between *amicus* Santa Ynez Band and the State of California, the Tribe limited tort claims damages to twice the amount of medical bills incurred by the claimant. As a result of re-negotiations with the State, however, there is no such limitation in the recently negotiated compact.

Some negotiated compact provisions require the Tribe to adopt state laws. For example, for purposes of patron tort claims, *amicus* Prairie Band Potawatomi Nation agreed to adopt the Kansas Tort Claims Act to the extent not inconsistent with the IGRA or tribal law, with some exceptions. Prairie Band Potawatomi Nation Compact, *supra* note 15, at § 3(D). The compact further sets required levels for liability insurance and requires the policy to include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to those limits. *Id.* at § 3(E). In addition, the compact requires the Tribe to indemnify state officials and employees, as follows:

> The Tribe shall indemnify, defend and hold harmless the State, its officers, directors, employees and agents from and against any claims, damages, losses or expenses asserted against or suffered or incurred by the State or its officers, directors, employees and agents (except as may be the result of their own negligence) based upon or arising out of any bodily injury or property damage resulting or claimed to result in whole or in part from any act or omission of the Tribe relating to the inspection of any gaming-related facilities, or any rectification thereof, pursuant to this Compact or applicable tribal law regarding public health, safety and welfare.

Id.

Like the Prairie Band's compact, *amicus* Lac du Flambeau Band of Lake Superior Chippewa's gaming compact requires the Tribe to maintain public liability insurance within certain limits; requires an endorsement prohibiting the insurer from invoking tribal sovereign immunity up to those limits; and

requires the Tribe to indemnify the State and its officers or employees from certain claims relating to the inspection of gaming or gaming related facilities. Lac du Flambeau Band of Lake Superior Chippewa Indians and State of Wisconsin Gaming Compact § XIX (1992).[21]

In other compact provisions, Tribes and States have agreed to permit state court proceedings to varying degrees, like the Gaming Compact between *amicus* Seminole Tribe of Florida and the State of Florida, which includes a tort claims procedure applicable to patrons alleging injury in any facility where games covered by the Compact are played. Seminole Tribe Compact, *supra* note 13, at Part VI.D. The Tribe's compact adopts an administrative procedure through which written notice of the claim must be provided to the Tribe and the Tribe's insurance carrier must seek to resolve the claim. In the event the claim cannot be resolved by the insurance carrier, the Compact provides as follows:

> If the Patron and the Tribe and the insurance carrier are not able to resolve the claim in good faith within one (1) year after the Patron provided written notice to the Tribe's Risk Management Department or the Facility, the Patron may bring a tort claim against the Tribe in any court of competent jurisdiction in the county in which the incident alleged to have caused injury occurred, as provided in this Compact, and subject to a four (4) year statute of limitations, which shall begin to run from the date of the incident of the

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[21] The Lac du Flambeau Band's compact is available at https://www.bia.gov/cs/groups/xoig/documents/text/idc1-025284.pdf.

> alleged claimed injury. A Patron's notice of injury to the Tribe pursuant to Section D.1. of this Part and the fulfillment of the good faith attempt at resolution pursuant to Sections D.2. and 4. of this Part are conditions precedent to filing suit.

Id. at Part VI.D.4. The Compact also includes a limited waiver of tribal sovereign immunity for such suits (to the same extent as the State of Florida waives its immunity for tort claims),[22] but specifies that claims shall be brought against the Tribe as the sole party in interest, not against tribal employees. *Id.* at Part VI.D.5.

Similar to the Seminole Tribe's compact, USET member St. Regis Mohawk Tribe's compact agrees to designate the state courts as the forum for personal injury claims. The compact requires the Tribe to maintain liability insurance and provides that the "[c]ourts of the State of New York shall adjudicate claims for personal injury to patrons of Gaming Facilities pursuant to 25 U.S.C. Section 233[,]" which provides the courts of the State of New York with

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[22] Like the Seminole compact, the Oklahoma model compact, entered into by several Tribes including *amici* Cheyenne and Arapaho Tribes and Absentee-Shawnee Tribe of Indians of Oklahoma, includes a limited waiver of sovereign immunity but requires that an administrative process be followed as a precondition to any suit. *E.g.*, Tribal Gaming Compact between the Cheyenne-Arapaho Tribes of Oklahoma and the State of Oklahoma Part 6 (2005), https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc-038408.pdf. The administrative process requires submission of a written claim notice to the Tribe within one year of the incident alleged to have caused injury, and the compact provides that claims that do not follow the administrative procedures shall be barred. *Id.* at Parts 6.A.4, 6.A.10.

jurisdiction in civil actions between Indians and between Indians and other persons. Tribal-State Compact between the St. Regis Mohawk Tribe and the State of New York § 3(g) (1995);[23] 25 U.S.C. § 233. In contrast, USET member Seneca Nation of Indians—also located in New York—agreed in its Tribal-State compact to provide its own procedures for personal injury claims against (and to maintain public liability insurance insuring) the Nation's gaming operation, as well as its agents and employees specifically. Nation-State Gaming Compact between the Seneca Nation of Indians and the State of New York § 9 (2002).[24]

Amici Tribes' compacts illustrate (but do not exhaust) the range of negotiated provisions that may be available to resolve questions over the availability of tort remedies for state citizens affected by tribal gaming activities, above and beyond the default federal rules of immunity. To permit non-negotiated, state court remedies against individual employees would both effectively nullify these and other negotiated compact agreements under the IGRA and undermine the longstanding requirement that parties exhaust available tribal remedies before seeking relief in state or federal court. *See, e.g., Drumm v. Brown*, 716 A.2d 50 (Conn. 1998).[25] Though the tribal

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[23] The St. Regis Mohawk Tribe's compact is available at http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-025714.pdf.

[24] The Seneca Nation's compact is available at https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc-038394.pdf.

[25] This Court has often stated the rule requiring the exhaustion of available tribal remedies prior to seeking relief in federal courts. *E.g., Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985). In *Iowa Mut. Ins. Co. v. LaPlante*, this Court

remedies provided in Tribal-State compacts may vary, in each case they offer an available process that both the Tribe and State have agreed is fair and adequate, and that the federal government has approved or deemed approved under federal law. They cannot simply be ignored by claimants preferring an alternate forum.

Contrary to clear congressional intent, accepting the Petitioners' arguments in this case would render negotiated Tribal-State compact provisions and the tort remedies required thereunder meaningless by providing an alternative, judicially created remedy outside the scope of compact negotiations. The IGRA does not permit that result, and provides this Court with clear and narrow grounds on which to rule in this case.[26]

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also said: "If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law." 480 U.S. 9, 15 (1987) (citing *Fisher v. District Court*, 424 U.S. 382 (1976)).

[26] Given the preemptive role of the IGRA in this case, it is easily distinguished from *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013), the case primarily relied upon by Petitioners in this case but not involving tribal gaming employees. Accordingly, the Court need not reach the validity of that decision. *Amicus* Tribes believe that *Maxwell* was wrongly decided, but it should be emphasized that IGRA preemption did not apply in that case—something Petitioners have overlooked in their argument. Compare *Maxwell* with *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 727 (9th Cir. 2008) (holding that tribal sovereign immunity extended to employees of tribal gaming enterprise because the sovereign entity is the real, substantial party in interest).

II. Tort remedies and immunity waivers are also commonly negotiated in a range of other intergovernmental agreements that advance both state and tribal interests.

Of course, the ruling sought by the Petitioners in this case is so broad that it would permit state court suits not only against employees of tribal gaming enterprises, but against any tribal official or employee for any action in connection with official tribal business or employment. As in the gaming context, however, Tribes and state and local governments already address questions of tort liability in negotiated agreements that provide important benefits to both sovereigns and their citizens, and which would be disrupted and perhaps destroyed by the ruling Petitioners seek.

For example, several Tribes in Washington State, including *amicus* Suquamish Tribe, have joined with local and state governmental counterparts to form a regional intergovernmental agreement for public health response purposes in the event of a public health incident like a disease outbreak, regional emergency, or natural disaster requiring sharing of health care and public health services (the "Olympic Regional Agreement").[27] This mutual aid agreement enables tribal or regional health departments to call for the healthcare resources of all participating parties to respond to incidents as needed. The agreement provides that there will be a unified "command and control" system in which a Tribe would affirmatively

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[27] Olympic Regional Tribal-Public Health Collaboration and Mutual Aid Agreement (2014), http://www.aihc-wa.com/files/2011/09/Olympic-Regional-Tribal-Public-Health-Mutual-Aid-Agreement1.pdf.

allow a non-tribal health officer to exercise state-derived public health authority over the Tribe's land and citizens (authority that may include, but is not limited to, isolation and quarantine of patients, emergency response, or special waste control activities). Olympic Regional Agreement, at Art. IX. The responding personnel would be a mixture of tribal and non-tribal health officials and healthcare workers. *Id.* at Art. X. The need for such an agreement is manifest in the Pacific Northwest, where some tribal health facilities are the only ones available within many miles to serve both Native and non-Native individuals and communities. It is equally important to delineate jurisdiction and authority in those tribal communities that lie within or adjacent to metropolitan areas to ensure that gaps in coverage of tribal communities do not render public health or disaster responses ineffective.

The Olympic Regional Agreement addresses liability and claims. The agreement explicitly states that it does not constitute a waiver of applicable sovereign immunity (for the participating Tribes and local or state agencies), and leaves untouched any tort claims acts that may apply. *Id.* at Art. XIII. The agreement also contains a provision for mutual defense and indemnification when there is no applicable immunity, as well as an agreement to participate in legal proceedings when requested by another party. *Id.* The parties to the Olympic Regional Agreement have attempted to both maintain the status quo of immunity and liability that normally applies to the parties, and also provide a safety net of indemnification if immunity and liabilities are in question and something goes wrong.

The ruling Petitioner seeks would endanger the ability of Tribes and local governments—like those in the Olympic Regional Agreement—to respond to emergencies in a unified and effective way. As a primary concern, such a ruling would remove the immunity protections applicable to tribal employees, and make them (and their Tribes) particularly vulnerable to lawsuits that may arise from an emergency public health response. Potentially, if Petitioners' argument were accepted, agreements like this one could burden all signatories with the need to defend against claims that would otherwise be precluded. At the very least, the preferred solution of the Tribes and local governments in this case to maintain immunity and liability through their negotiated agreement would be disregarded under the ruling sought by Petitioners.

The scope of tort remedies available to non-Indians likely to interact with tribal employees as a result of tribal business with or within the State is a prime subject for intergovernmental agreements. The circumstances and considerations involved—e.g., the various interests of the Tribe and state or local governments at stake, the category of tribal employee likely to be involved and the scope of their duties, the locus of activity, the purposes for which that activity is carried out and the costs and benefits to the Tribe, State, and the public of the activity, among other factors—are different in each case. In the context of an intergovernmental agreement, Tribes and state or local governments each have the opportunity to protect their legitimate sovereign interests, and individual state citizens are also protected because the state or local government negotiates and enters into a consensual, mutually beneficial agreement with the Tribe on their behalf. These agreements, as a general

matter, provide an opportunity for creative problem-solving and are likely to lead to stronger working relationships between Tribes and state and local governments, leading to better services and outcomes for local residents.[28]

In contrast, the broad ruling sought by Petitioners is a blunt instrument that would cause a great deal of collateral damage in seeking to address a largely non-existent problem. Apart from the impact to Tribes of effectively eviscerating tribal sovereign immunity by offering individual capacity suits as an end-run around it, such a ruling would both upend existing intergovernmental agreements and upset the balance of interests that incentivizes the parties to come together to address pressing local issues of shared concern.[29]

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[28] *See, e.g.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.05 at 588-89 (Nell Jessup Newton, ed., 2012) [hereinafter, COHEN'S HANDBOOK]:

> In the face of potentially overlapping or conflicting jurisdictional claims, tribal-state cooperative agreements offer both sets of governments the opportunity to coordinate the exercise of authority, share resources, reduce administrative costs, deliver services in more efficient and culturally appropriate ways, address future contingencies, and save costs of litigation. They also enable governments to craft legal arrangements reflecting the particular circumstances of individual Indian nations, rather than relying on uniform national rules. Insofar as cooperative agreements create a stable legal environment conducive to economic development, they may appeal to the common interests of tribes and states.

[29] *See, e.g.*, *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 131 (2005) (Ginsburg, J., dissenting) ("By truncating the balancing-of-interests approach, the Court has diminished prospects for cooperative efforts to achieve resolution of taxation

III. Even where Tribes are under no obligation to negotiate, tribal laws generally provide tort remedies as a matter of good governance and smart business.

Tribes know that the provision of meaningful tort remedies for actions involving tribal employees is necessary to preserve and advance their working relationships with other governments, potential investors and business partners, patrons of tribal businesses, and their own citizens. As a result, even when Tribes have no occasion or are under no obligation to negotiate with state and local governments to provide tort remedies to state citizens, Tribes generally act to ensure that parties injured in the course of dealings with the Tribe and its officials or employees will have access to effective, meaningful remedies. Tribes carefully calibrate these remedies to provide recourse to injured parties in a fair and equitable manner while at the same time protecting the sovereign interests and financial resources of the Tribe. Far from being a unilateral attempt to insulate themselves from liability, as the Petitioners wrongly characterize the Mohegan Tribe's tort ordinance, these tribal laws and policies are adopted against the backdrop of federal rules of immunity and open up remedies that otherwise would not be available, much like state and federal tort measures enacted to ensure fair compensation for victims of governmental torts.

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issues through constructive intergovernmental agreements."); COHEN'S HANDBOOK § 6.05 at 589-90 (Tribes may be reluctant to enter into cooperative agreements where they lack sufficient bargaining power to achieve their goals).

For example, the Eastern Band of Cherokee Indians (a USET member Tribal Nation), through its civil procedure code, grants the tribal court jurisdiction to hear tort claims brought against the Tribe, while protecting the Tribe's limited resources by extending the jurisdiction only to those claims for which the Tribe maintains insurance coverage.[30] Further, recovery on tort claims is limited to the amount of liability coverage. The Tribe has made a decision to open its courts to tort claims in order to provide a venue (and potential remedy) for plaintiffs seeking to recover against the Tribe.[31]

Likewise, while *amicus* Kickapoo Traditional Tribe of Texas does not currently engage in Class III gaming pursuant to an IGRA compact, the Tribe conducts Class II gaming pursuant to a tribal gaming ordinance approved by the federal National Indian Gaming Commission that includes a dispute resolution provision for patron claims. KICKAPOO TRADITIONAL TRIBE OF TEXAS GAMING ORDINANCE § 113 (2006).[32] Pursuant to that provision, patrons have the right to submit claims to the Tribal Gaming Commission, which shall hold a hearing (at which the claimant may have counsel present) within 30 days. *Id.* Recovery is limited to the amount of actual proven damages in

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[30] EASTERN BAND OF CHEROKEE INDIANS CODE, Part II, Ch. 1, Art. 1 § 1-2(g)(3) (2016), https://www.municode.com/library/nc/cherokee_indians_eastern_band/codes/code_of_ordinances?nodeId=13359.

[31] *See Welch v. Eastern Band of Cherokee Indians*, 6 Cher. Rep. 20, 2007 WL 7079613 at *5 (Eastern Cher. Ct. App. 2007) (denying motion to dismiss tort claims against Tribe).

[32] The Kickapoo Traditional Tribe's gaming ordinance is available at http://www.nigc.gov/images/uploads/gamingordinances/kickapootraditionaltrbtx-kickapootribeord121806.pdf.

order to protect tribal resources. *Id.* *Amicus* Lytton Rancheria, which also conducts Class II gaming only, has elected to permit tort claims through a claims process involving the Tribe's insurance administrator. These *Amici* Tribes, like other Tribes across the country, understand the importance of addressing personal injury claims as a matter of good business and tribal governance. As a result, non-Indians injured in the course of interactions with tribal employees are simply not, as a general rule, left without a remedy as a result of tribal immunity.

CONCLUSION

In taking steps to ensure that meaningful remedies are available to parties injured by the actions of tribal officials and employees acting within the scope of their authority, Tribes negotiate the content and scope of those remedies with their sister governments and craft responsive tribal laws in a manner that balances individual protections with other tribal and state sovereign interests. Contrary to the Petitioners' representations, it is a rare situation (and one not presented in this case) where a tort victim truly lacks any meaningful remedy. This Court should not be swayed by the Petitioners' misleading appeals to invented fairness concerns.

Aside from being unnecessary, the ruling sought by Petitioners would be damaging. Petitioners' argument for opening up individual capacity suits against tribal employees has no limits and makes no distinctions—for example, whether the allegedly harmful acts were within the scope of employment or not; whether or not the Tribe has in fact made a remedy available, as it did in this case; or whether the incident occurred on tribal or non-tribal lands. As a result, the ruling Petitioners seek in this case would undermine every one of *Amici*

Tribes' negotiated intergovernmental agreements and carefully crafted tribal laws discussed above, along with every other such negotiated agreement and tribal law throughout the country. There is no need for this Court to make such a sweeping change to existing laws and expectations, particularly in a case like this one where Congress has acted through the IGRA to preempt the field and require that the type of remedies sought by Petitioners be defined only through negotiated intergovernmental compacts balancing both state and tribal interests.

Respectfully submitted,

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December 21, 2016